

















THE  
ONTARIO LAW REPORTS.

---

2586  
CASES DETERMINED IN THE COURT OF APPEAL  
AND IN THE HIGH COURT OF JUSTICE  
FOR ONTARIO.

1910.

REPORTED UNDER THE AUTHORITY OF THE  
LAW SOCIETY OF UPPER CANADA.

---

VOL. XXI.

EDITOR:  
EDWARD B. BROWN, K.C.

TORONTO :  
CANADA LAW BOOK COMPANY, LIMITED,  
LAW BOOK PUBLISHERS,  
32-34 TORONTO ST.  
1910



JUDGES  
OF THE  
HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

---

*King's Bench Division :*

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.  
“ “ BYRON MOFFATT BRITTON, J.  
“ “ WILLIAM RENWICK RIDDELL, J.

*Chancery Division :*

THE HON. SIR JOHN ALEXANDER BOYD, C., K.C.M.G.  
“ “ FRANCIS ROBERT LATCHFORD, J.  
“ “ WILLIAM EDWARD MIDDLETON, J.

*Common Pleas Division :*

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.C.P.  
“ “ HUGH MACMAHON, J.  
“ “ JAMES VERNALL TEETZEL, J.

*Exchequer Division :*

THE HON. SIR WILLIAM MULOCK, C.J.Ex.D., K.C.M.G.  
“ “ ROGER CONGER CLUTE, J.  
“ “ ROBERT FRANKLIN SUTHERLAND, J.





## CALL TO THE BAR.

---

During Trinity Term, 1910, the following gentlemen were called to the Bar:—

FRANK JAMES AP'JOHN.

ANTHONY IGNATIUS MCKINLEY.

WILLIAM DARLAND MCLEAN SHOREY.

ALLAN COLLINGWOOD TRAVERS LEWIS.

THEODORE HENRY PEINE.

JOHN ARMOUR DYKE.

WILLIAM GARNET ANDERSON.

JOHN CAMERON MACDONALD.

GOLDWIN STARR MCMAHON.

ROY EDGAR ALEXANDER.

SIDNEY MORTIMER FITZGERALD.

RODERICK DINGWALL.

## ERRATA.

---

- Page 41, 6th line from bottom: for "*Rex v. Randolph*," read "*Regina v. Randolph*."
- " 227, 14th line from top: for "dispensing" read "disposing."
- " 251, 16th line from top: for "12 pp. Cas." read "12 App. Cas."

## CASES REPORTED.

A.		Canadian Pacific R.W. Co., Goldstine v.....	575
Ackers, Rex v..... (D.C.)	187	Canadian Pacific R.W. Co., Robinson v.....	575
Ætna Life Insurance Co. of Hartford, Somerville v....	276	Canadian Railway Accident Co. v. Williams.....	472
Allen v. Canadian Pacific R. W. Co..... (C.A.)	416	Chatham, City of, Re Karry and..... (C.A.)	566
Alliston, Town of, Re Ryan and.....	582	Chesley, Town of, Re Schu- macher and..... (D.C.)	522
Almonte, Town of, Re Giles and..... (D.C.)	362	Clarke, Goodall v..... (D.C.)	614
Ancient Order of Foresters, Court Harmony No. 7045, Thompson v..... (D.C.)	303	Court Harmony No. 7045 Ancient Order of Foresters, Thompson v..... (D.C.)	303
B.		Crawford, Green v., Re. (Chrs.)	36
Bank of Montreal's Claim ..... (C.A.)	1	Currie, Stow v..... (D.C.)	486
Beardmore v. City of Toronto ..... (C.A.)	505	D.	
Beer v. Williams.....	49	Dale and Township of Blan- chard, Re..... (D.C.)	497
Begg and Township of Dun- wich, Re.....	74	Davis v. Shaw..... (D.C.)	474
Bennett v. Havelock Electric Light and Power Co. (D.C.)	120	Dominion Express Co. v. Maughan..... (C.A.)	510
Big Cities Realty and Agency Co., Thompson v.... (D.C.)	394	Dunwich, Township of, Re Begg and.....	94
Birkett, Johnson v.....	319	Duryea v. Kaufman.. (Chrs.)	161
Blanchard, Township of, Re Dale and..... (D.C.)	497	E.	
Booth, Sprague v..... (C.A.)	637	Earl v. Reid..... (D.C.)	545
Brown v. City of Toronto ..... (D.C.)	230	East Nissouri (Section 3) Public School Board, Mc- Murray v..... (D.C.)	46
Burman v. Ottawa Electric R.W. Co..... (C.A.)	446	Ellis and Town of Renfrew, Re.....	74
C.		Everitt v. Township of Ra- leigh.....	91
Canadian Coloured Cotton Mills Co., Vano v.....	144	F.	
Canadian Express Co., Ford v..... (D.C.)	585	Farah, Grills v.....	457
Canadian Northern R.W. Co., Laurie v..... (D.C.)	178	Farrell, Rex v..... (D.C.)	540
Canadian Pacific R.W. Co., Allen v..... (C.A.)	416	Fitzgerald v. Mandas.....	312
		Ford v. Canadian Express Co..... (D.C.)	585

Foresters, Ancient Order of, Court Harmony No. 7045, Thompson v..... (D.C.)	303
Frank, Rex v..... (C.A.)	196
French, Piggott v.....	87

## G.

Galley, Rushton v..... (D.C.)	135
Giles and Town of Almonte, Re..... (D.C.)	362
Goldstine v. Canadian Pacific R.W. Co.....	575
Good and Jacob Y. Shantz Son & Co. Limited, Re ..... (D.C.)	153
Goodall v. Clarke..... (D.C.)	614
Grand Trunk R.W. Co., New- man v..... (D.C.)	72
Graves, Rex v..... (D.C.)	329
Green v. Crawford, Re (Chrs.)	36
Grills v. Farah.....	457

## H.

Haigh v. Toronto R.W. Co. ..... (D.C.)	601
Havelock Electric Light and Power Co., Bennett v. ..... (D.C.)	120
Hessey v. Quinn..... (D.C.)	519
Hicks, Wilson v..... (D.C.)	623

## I.

Idhe v. Starr..... (C.A.)	407
Imperial Steel and Wire Co., Lindsay v..... (D.C.)	375

## J.

Johnson v. Birkett.....	319
Jones v. Toronto and York Radial R.W. Co..... (C.A.)	421

## K.

Karry and City of Chatham, Re..... (C.A.)	566
Kaufman, Duryea v... (Chrs.)	161

## L.

Laurie v. Canadian Northern R.W. Co..... (D.C.)	178
Lindsay v. Imperial Steel and Wire Co..... (D.C.)	375
Lobb v. Lobb.....	262

## M

Macdonald, Rex v..... (C.A.)	38
McMillan, Stavert v.....	245
McMurray v. East Nissouri (Section 3) Public School Board..... (D.C.)	46
Mandas, Fitzgerald v.....	312
Maughan, Dominion Express Co. v..... (C.A.)	510
Mickleborough, Powley v. ..... (D.C.)	565
Mickleborough v. Strathy....	259
Molson, Re, Ward v. Steven- son..... (D.C.)	289
Mooney, Stratford Fuel Ice Cartage and Construction Co. v..... (C.A.)	426
Morley v. Patrick..... (D.C.)	240

## N.

Nettleton v. Town of Prescott ..... (C.A.)	561
Newman v. Grand Trunk R. W. Co..... (D.C.)	72

## O.

Ontario Bank, Re..... (C.A.)	1
O'Reilly v. O'Reilly... (C.A.)	201
Ottawa Electric R.W. Co., Burman v..... (C.A.)	446

## P.

Patrick, Morley v..... (D.C.)	240
Pembroke, Township of, and County of Renfrew, Re ..... (D.C.)	366
Perrie, Re.....	100
Piggott v. French.....	87
Powley v. Mickleborough ..... (D.C.)	565



Prangley and Town of Strathroy; Re.....	54	Sprague v. Booth..... (C.A.)	637
Prescott, Town of, Nettleton v..... (C.A.)	561	Starr, Ihde v..... (C.A.)	407
Price v. Price.....	454	Stavert v. McMillan.....	245
Q.		Stephens v. Riddell.....	484
Quinn, Hessey v..... (D.C.)	519	Stevenson, Ward v., Re Molson..... (D.C.)	289
R.		Stokes, Re.....	464
Raleigh, Township of, Everitt v.....	91	Stow v. Currie..... (D.C.)	486
Reid, Earl v..... (D.C.)	545	Stratford Fuel Ice Cartage and Construction Co. v. Mooney..... (C.A.)	426
Renfrew, County of, Re Township of Pembroke and..... (D.C.)	366	Strathroy, Town of, Re Prangley and.....	54
Renfrew, Town of, Re Ellis and.....	14	Strathy, Mickleborough v... ..	259
Rex v. Ackers..... (D.C.)	187	T.	
Rex v. Farrell..... (D.C.)	540	Thompson v. Big Cities Realty and Agency Co... (D.C.)	394
Rex v. Frank..... (C.A.)	196	Thompson v. Court Harmony No. 7045 Ancient Order of Foresters..... (D.C.)	303
Rex v. Graves..... (D.C.)	329	Toronto and York Radial R. W. Co., Jones v. .... (C.A.)	421
Rex v. Macdonald..... (C.A.)	38	Toronto, City of, Beardmore v..... (C.A.)	505
Rex v. Williams..... (C.A.)	467	Toronto, City of, Brown v. .... (D.C.)	230
Rex v. Yorkema..... (C.A.)	193	Toronto R.W. Co., Haigh v. .... (D.C.)	601
Riddell, Stephens v.....	484	V.	
Robinson v. Canadian Pacific R.W. Co.....	575	Vano v. Canadian Coloured Cotton Mills Co.....	144
Roetter, Schwent v.....	112	W.	
Rushton v. Galley..... (D.C.)	135	Ward v. Stevenson, Re Molson..... (D.C.)	289
Ryan and Town of Alliston, Re.....	582	Williams, Beer v.....	49
S.		Williams, Canadian Railway Accident Co. v.....	472
Schumacher and Town of Chesley, Re..... (D.C.)	522	Williams, Rex v..... (C.A.)	467
Schwent v. Roetter.....	112	Wilson v. Hicks..... (D.C.)	623
Selkirk v. Windsor Essex and Lake Shore Rapid R.W. Co..... (D.C.)	109	Windsor Essex and Lake Shore Rapid R.W. Co., Selkirk v..... (D.C.)	109
Shantz (Jacob Y.) Son & Co. Limited, Re Good and..... (D.C.)	153	Y.	
Shaw, Davis v..... (D.C.)	474	Yorkema, Rex v..... (C.A.)	193
Solicitor, Re.....	255		
Somerville v. Aetna Life Insurance Co. of Hartford..	276		



# CASES CITED.

		A.		
NAME OF CASE.			WHERE REPORTED.	PAGE
Abrath v. North Eastern R.W. Co. ....	11	Q.B.D. 79, 440, 11 App. Cas.		
		247.....		585, 593
Ackers v. Howard.....	16	Q.B.D. 739, at p. 746....		363, 532
African Gold Recovery Co. v. Sheba Gold Mining Co. ....	14	R.P.C. 660, 663.....		171
Aldous v. Cornwell.....		L.R. 3 Q.B. 573.....		340
Alexander v. Automatic Telephone Co..	[1900]	2 Ch. 56.....		129
Alexander v. Sizer.....		L.R. 4 Ex. 102.....		396, 405
Alexander, In re.....	[1910]	W.N. 36.....		464, 467
Alexandra Oil and Development Co. v. Cook.....	10	O.W.R. 781.....		435
Alkaline Reduction Syndicate Limited, In re.....	45	W.R. 10.....		383, 391
Allcard v. Skinner.....	36	Ch.D. 145.....		130
Allen v. Canadian Pacific R.W. Co....	19	O.L.R. 510, at pp. 516, 517..		
		.....		177, 182
Allen v. Sharp.....	17	L.J. Ex. 209, at p. 212.....		33
Almada and Tirito Co., In re.....	38	Ch.D. 415.....		380
Ambrose Lake Tin and Copper Mining Co., In re.....	14	Ch.D. 390.....		129
Ames v. Sutherland.....	11	O.L.R. 417, at p. 420.....		618
Anderson v. Oppenheimer.....	5	Q.B.D. 602.....		558, 560
Arbib and Class's Contract, In re.....	[1891]	1 Ch. 601, at p. 613.....		634
Archibald v. McLaren.....	21	S.C.R. 588.....		585, 593, 594
Armitage v. Walker.....	2	K. & J. 211.....		312
Armour v. Town of Peterborough.....	10	O.L.R. 306.....		238
Armour and Township of Onondaga, Re	14	O.L.R. 606, 608... 69, 95, 523,		537
Armstrong v. Michigan Central R.W.Co.	1	O.W.R. 714.....		182
Arnold v. Bainbrigg.....	9	Ex. 153.....		402
Ashbury Railway Carriage and Iron Co. v. Riche.....		L.R. 7 H. L. 653.....		10, 23, 24
Ashcroft v. Morrin.....	4	M. & G. 450.....		489
Atkin v. Wardle.....	61	L.T.R. 23.....		396, 404
Atkinson v. City of Chatham.....	26	A.R. 521.....		237
Attorney-General v. London and North Western R.W. Co. ....	[1892]	3 Ch. 274.....		401
Attorney-General v. Great Eastern R.W. Co.....	5	App. Cas. 473, 486.....		10, 18, 23
Attorney-General v. London City Council.....	[1901]	1 Ch. 781, 797.....		10
Attorney-General v. Sillem.....	2	H. & C. 431, 581, 10 H.L.C. 704		
		.....		355
Attorney-General for Ontario v. Attor- ney-General for the Dominion.....	[1896]	A.C. 348.....		507
Auerbach v. Hamilton.....	19	O.L.R. 570.....		395, 404, 405
Ayers v. South Australian Banking Co..		L.R. 3 P.C. 548, at p. 559.....		25
B.				
Bache v. Billingham.....	[1894]	1 Q.B. 107.....		312
Bagley v. Mollard.....	1	R. & M. 581.....		266
Bagnall v. Carlton.....	6	Ch.D. 371, 385.....		128
Bahia and San Francisco R.W. Co., In re		L.R. 3 Q.B. 584.....		614, 618, 622
Bailey v. Taylor.....	11	Conn. 531.....		342
Baker v. Bishop Hill Colony.....	45	Ill. 264.....		647
Baker v. Municipal Council of Paris....	10	U.C.R. 621.....		567, 568, 573

NAME OF CASE.	WHERE REPORTED.	PAGE
Bank of Australasia v. Breillat.....	6 Moo. P.C. 152, 12 Jur. 189....	2, 10, 11, 14, 17, 23, 24, 25, 30, 33
Bank of South Australia, In re.....	[1895] 1 Ch. 578.....	10, 19
Bank of Syria, In re.....	[1900] 2 Ch. 272, [1901] 1 Ch. 115.....	382
Bank of Toronto v. Lambe.....	12 App. Cas. 575.....	507
Bank of Toronto v. Perkins.....	8 S.C.R. 603.....	251
Barber v. McCuaig.....	31 O.R. 593.....	463
Barber v. Toronto R.W. Co.....	17 P.R. 293.....	232
Barclay and Township of Darlington, In re.....	12 U.C.R. 86.....	567, 573
Barnard v. Duplessis Independent Shoe Machinery Co.....	Q.R. 31 S.C. 362.....	155
Barton, Township of, v. City of Hamil- ton.....	13 O.W.R. 1118.....	383
Bathurst, Borough of, v. Macpherson..	4 App. Cas. 256....	233, 234, 236, 240
Baxter v. Combe.....	1 Ir. Ch. R. 284.....	175
Bayliss, In re.....	[1896] 2 Ch. 107.....	257
Baynton v. Morgan.....	21 Q.B.D. 101, 22 Q.B.D. 74....	314
Beal v. South Devon R.W. Co.....	3 H. & C. 337, 341.....	183
Beam v. Merner.....	14 O.R. 412.....	164, 171
Beaman v. Russell.....	20 Vt. 205.....	341
Beard v. Smith.....	22 Ky. (6 T. B. Monroe) 430, at p. 489.....	104
Behan v. Erickson.....	7 Q.L.R. 295.....	209, 219, 227
Bell v. Golding.....	23 A.R. 485.....	409
Bell and Corporation of Elma, Re.....	13 O.L.R. 80.....	523, 532, 538
Bellerby v. Rowland & Marwood's S.S. Co.....	[1902] 2 Ch. 14, 27.....	251
Bell Telephone Co. v. City of Chatham.	31 S.C.R. 61.....	93, 238
Bentley v. Craven.....	18 Beav. 75, at p. 77.....	326
Bicknell v. Grand Trunk R.W. Co.....	26 A.R. 431.....	579
Birchall, In re.....	16 Ch.D. 41.....	148
Birks v. Birks.....	34 L.J.N.S.P. 90.....	291, 298
Birmingham v. Hungerford.....	19 C.P. 411.....	46, 47
Bishop v. Chambré.....	3 C. & P. 55.....	341
Black v. Christchurch Finance Co.....	[1894] A.C. 48.....	548
Black v. Coleman.....	29 C.P. 507.....	521
Blackburn and District Benefit Building Society v. Cunliffe Brooks & Co....	29 Ch.D. 902.....	21
Blackburn Building Society v. Cunliffe Brooks & Co.....	22 Ch.D. 61, 70.....	19, 21
Blake v. Woolf.....	[1898] 2 Q.B. 426.....	548, 558
Blake, Re, Blake v. Power.....	60 L.T.N.S. 663.....	634
Bligh v. Tredgett.....	21 L.J.Ch. 204.....	150
Bliss v. Boeckh.....	8 O.R. 451.....	137
Boddington, In re.....	22 Ch.D. 597, 25 Ch.D. 685....	103, 104
Boissy v. Daignault.....	Q.R. 10 S.C. 33.....	213
Bollander v. City of Ottawa.....	30 O.R. 7, 27 A.R. 335.....	506
Boodle v. Campbell.....	7 M. & G. 386.....	315
Book v. Book.....	32 O.R. 206.....	631
Bostock v. North Staffordshire R.W. Co.....	4 E. & B. 798, at p. 832.....	356
Bouchard v. Beaulieu.....	Q.R. 14 S.C. 483.....	225
Bowden v. Henderson.....	2 Sm. & Giff. 360.....	286
Bower v. Peate.....	1 Q.B.D. 321....	545, 548, 552, 555
Boyd v. Mortimer.....	30 O.R. 290, at pp. 296, 297....	396, 405
Bray v. Ford.....	[1896] A.C. 44.....	435
Bremer v. Freeman.....	10 Moore P.C. 306.....	222, 223
Brenner v. Toronto R.W. Co.....	15 O.L.R. 195, 198.....	446, 451
Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario.....	[1897] A.C. 231.....	506



NAME OF CASE.	WHERE REPORTED.	PAGE
Brice v. Munro.....	12 A.R. 453.....	460, 461
Brien v. Swainson.....	1 L.R. Ir. 135.....	490
Briscoe v. Stephens.....	2 Bing. 213.....	189
Bristol and Exeter R.W. Co. v. Collins.....	7 H.L.C. 194.....	182
British Seamless Paper Box Co., In re.....	17 Ch.D. 467.....	120, 131
Brogden v. Metropolitan R.W. Co.....	2 App. Cas. 666, at p. 672.....	491
Brooks v. Corporation of Haldimand.....	3 A.R. 73.....	369, 374
Brown v. Davy.....	18 O.R. 559.....	630
Brown, In re, Brown v. Brown.....	37 W.R. 472.....	272
Brown, Re, Walsh v. Browne.....	62 L.T.R. 899.....	272
Brown's Case.....	L.R. 9 Ch. 102.....	436
Bryan, In the Estate of.....	[1907] P. 125, 76 L.J.N.S.P. 30.. 289, 297, 298, 299, 300, 301, 302	268
Bryon, In re.....	30 Ch.D. 110.....	268
Buliner v. London Chatham and Dover R.W. Co.....	1 Times L.R. 534.....	447
Burgoyne v. Collins.....	8 Q.B.D. 450.....	363
Burland v. Earle.....	[1902] A.C. 83, at p. 93..... 125, 126, 128, 129, 133, 383	104
Burlinson, Re, Hammond v. Rogerson.....	107 L.T.J. 82.....	231, 232, 233
Burns v. City of Toronto.....	13 O.L.R. 109, 10 O.W.R. 723..	447
Burriss v. Père Marquette R.W. Co.....	9 O.L.R. 259.....	563
Bussièrès v. Proulx.....	1 Rev. de Jur. 58, 507..... 204, 210, 217, 219, 225	634
Butler v. City of Toronto.....	10 O.W.R. 876.....	
Butler and Baker's Case.....	3 Rep. 25a.....	

## C.

Cadell v. Wilcocks.....	[1898] P. 21.....	292, 298
Caerphilly Colliery Co., In re, Pearson's Case.....	5 Ch.D. 336, at p. 342.....	128
Cain v. Moon.....	[1896] 2 Q.B. 283.....	115
Calder v. Smalley.....	66 Iowa 219, at p. 221.....	141
Calder and Hebble Navigation Co. v. Pilling.....	14 M. & W. 76.....	567
Caledonian R.W. Co. v. Colt.....	3 Macq. Sc. App. Cas. 833, at p. 839.....	356
Callaghan v. Dolwin.....	L.R. 4 C.P. 288, 295.....	312
Cameron v. Young.....	[1908] A.C. 176.....	548
Campbell v. Mathewson.....	5 P.R. 91.....	148
Campbell and City of Stratford, In re.....	14 O.L.R. 184.....	567, 568
Canada Paper Co. v. Gazette Publishing Co.....	32 N.B.R. 689.....	405
Canadian Oil Works Corporation, In re, Hay's Case.....	L.R. 10 Ch. 593.....	120, 128, 134
Canadian Pacific R.W. Co. v. Blain.....	34 S.C.R. 74, 79, 80.....	609
Carey v. City of Toronto.....	11 A.R. 416, 14 S.C.R. 172.....	409
Carmichael, In re.....	10 U.C.L.J.O.S. 325, at p. 326..	40
Carratt v. Morley.....	1 Q.B. 18.....	189
Carstairs v. Bates.....	3 Camp. 301, at p. 302.....	26
Castor v. Township of Uxbridge.....	39 U.C.R. 113.....	233, 237
Catarqui Bridge Co. v. Holcomb.....	21 U.C.R. 273.....	557
Cates v. Knight.....	3 T.R. 442, at p. 444.....	356
Chaddock v. Wilbrahan.....	5 C.B. 645.....	189
Chamberlain v. Chamberlin.....	11 P.R. 501.....	402, 462
Chambers v. Crichley.....	33 Beav. 374.....	176
Champion, In re.....	[1893] 1 Ch. 101.....	464, 467
Chandler v. Doulton.....	34 L.J.N.S. Ex. 89.....	520, 521
Chanter v. Leese.....	4 M. & W. 295.....	169
Chichester v. Quatrefages.....	[1895] P. 186.....	297
Childs v. Lissaman.....	23 N.Z.L.R. 945.....	556, 559, 560

NAME OF CASE.	WHERE REPORTED.	PAGE
Chinnoek v. Marchioness of Ely.....	4 DeG.J. & S. 638.....	486, 491, 492, 494, 495
Citizens' Insurance Co. v. Parsons.....	7 App. Cas. 96.....	507
Citizens' Life Assurance Co. v. Brown..	[1904] A.C. 423.....	589
Clark v. Adie.....	2 App. Cas. 423.....	172, 174
Clark v. Robinson.....	51 W.R. 443.....	491
Cleaver v. North of Scotland Canadian Mortgage Co.....	27 Gr. 508, at p. 514.....	480
Clemens v. Town of Berlin.....	7 O.L.R. 33.....	238
Coal Economising Gas Co., In re, Gover's Case.....	1 Ch.D. 182.....	128, 129
Coalport China Co., In re.....	[1895] 2 Ch. 404.....	153, 155, 156, 158
Cochrane v. Moore.....	25 Q.B.D. 57.....	115, 630
Codville Georgeson Co. v. Smart.....	15 O.L.R. 357.....	511, 512
Collard v. South Eastern R.W. Co.....	7 H. & N. 79.....	183
Collen v. Wright.....	8 E. & B. 647.....	110
Coltness Iron Co. v. Black.....	6 App. Cas. 315.....	474
Concha v. Murrieta.....	40 Ch.D. 543, 550.....	218, 222
Congreve v. Morgan.....	18 N.Y. 84.....	141, 142
Congreve v. Smith.....	18 N.Y. 79.....	141, 142
Connec v. Securities Holding Co.....	38 S.C.R. 601, at p. 615.....	327
Connors v. Darling.....	23 U.C.R. 541, 544, 552.....	87, 90
Converse v. Blumrich.....	14 Mich. 109.....	647
Copeland-Chatterson Co. v. Business Systems Co.....	16 O.L.R. 481.....	353
Corby v. Hill.....	4 C.B.N.S. 556.....	136
Cork and Youghal R.W. Co. v. Paterson.	18 C.B. 414.....	489
Cox v. Hakes.....	15 App. Cas. 506, at p. 514.....	357
Cox v. Hickman.....	9 C.B.N.S. 47, 85.....	512
Crawford v. Beattie.....	39 U.C.R. 13, at p. 31.....	562
Crawford v. Lawson Mine Limited.....	12 O.W.R. 454, at p. 463.....	489
Crediton, Bishop of, v. Bishop of Exeter.	[1905] 2 Ch. 455.....	340
Crenver and Wheal Abraham United Mining Co., In re, Ex p. Wilson....	L.R. 8 Ch. 45.....	383
Cribbin and City of Toronto, Re.....	21 O.R. 325.....	567
Croft and Town of Peterborough, Re....	17 O.R. 522, 17 A.R. 21.....	532
Crook v. Hill.....	L.R. 6 Ch. 311, 315.....	273
Cross v. Howe.....	62 L.J.Ch. 342.....	401
Cross v. Law.....	6 M. & W. 217, at p. 223.....	460
Crossley v. Dixon.....	10 H.L.C. 293.....	171, 174
Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society....	9 App. Cas. 857.....	21
Cutter v. Hamlen.....	147 Mass. 471.....	547
Cutto v. Gilbert.....	9 Moo. P.C. 131.....	291, 296
Cutts v. Thodey.....	13 Sim. 206.....	647
D.		
Dale and Township of Blanchard, Re....	14 O.W.R. 704, 1 O.W.N. 65.....	498
Dalton v. Angus.....	6 App. Cas. 740.....	545, 548, 553, 555
Dangerfield v. Jones.....	13 L.T.N.S. 142, at p. 143.....	175
Daniel v. Philipps.....	5 Tyrw. 293, at p. 307.....	40
Davidson v. Walker.....	1 N.S.W.S.R. 196.....	563
Dawes v. Harness.....	L.R. 10 C.P. 166.....	169
Dawson v. Great Northern and City R.W. Co.....	[1905] 1 K.B. 260.....	557
Debenham v. Mellon.....	5 Q.B.D. 394, at p. 398.....	456
De Bussche v. Alt.....	8 Ch.D. 286.....	129
De la Vega v. Vianna.....	1 B. & Ad. 284.....	228
Dempsey v. Lawson.....	2 P.D. 98.....	301
Denis v. Kent.....	Q.R. 18 S.C. 436.....	214, 219
Derry v. Peek.....	14 App. Cas. 337, at p. 346.....	311
Dessaint v. Ladrière.....	16 Q.L.R. 277.....	210, 211, 219
Devine v. Griffin.....	4 Gr. 603.....	491

NAME OF CASE.	WHERE REPORTED.	PAGE
Dickinson v. Burrell.....	L.R. 1 Eq. 337, at p. 342.....	557
Dickinson v. Dodds.....	2 Ch.D. 463.....	479, 480
Dickinson v. Valpy.....	10 B. & C. 128, 140.....	510, 515
Dickson v. Township of Haldimand....	2 O.W.R. 969, 3 O.W.R. 52.....	231, 233
Di Sora v. Philipps.....	10 H.L.C. 624.....	228
Dochtermann v. Brooklyn Heights R.W. Co.....	32 N.Y. App. Div. 13.....	447
Doe dem. Curzon v. Edmonds.....	6 M. & W. 295.....	409
Doe dem. Dayman v. Moore.....	9 Q.B. 555.....	409
Doe d. Hulin v. Powell.....	3 Car. & K. 323.....	324
Doe dem. Manton v. Austin.....	9 Bing. 41.....	173
Doe dem. Tatum v. Catomore.....	16 Q.B. 745.....	341
Dominion Coal Co. v. Dominion Iron and Steel Co.....	[1909] A.C. 293.....	26, 183
Dorab Ally Khan v. Abdool Azeez.....	L.R. 5 Ind. App. 116, 127.....	171
Dorin v. Dorin.....	L.R. 7 H.L. 568, 573.....	266
Douglas v. Baynes.....	[1908] A.C. 477.....	490, 494
Dove v. Dove.....	18 C.P. 424.....	317
Downs v. Collins.....	6 Hare 418, at p. 436.....	490
Doyle v. City of Glasgow Life Assurance.	53 L.J.N.S. Ch. 527.....	287
Drew v. New River Co.....	6 C. & P. 754.....	141
Drewitt v. Drewitt.....	58 L.T.R. 684.....	322
Dublin Wicklow and Wexford R.W. Co. v. Slaterry.....	3 App. Cas. 1155, at p. 1181.....	422, 424
Du Bochet, In re, Mansell v. Allen.....	[1901] 2 Ch. 441.....	272
Dummer v. Pitcher.....	2 My. & K. 262, 5 Sim. 35.....	116, 117
Duncan and Town of Midland, In re....	16 O.L.R. 132.....	54, 68, 77, 80, 81, 85
Dunlop v. Township of York.....	16 Gr. 216.....	136
Dunlop Tyre Co. v. Ryekman.....	5 O.L.R. 249.....	396
Dunn v. Travis.....	56 N.Y. App. Div. 317.....	286
Duryea v. Kaufman.....	21 O.L.R. 161.....	403
Dygart v. Schenck.....	23 Wend. 446.....	141, 142

## E.

E. v. F.....	10 O.L.R. 489, 11 O.L.R. 582.....	195
Earle v. Carson.....	188 U.S. 42.....	156
East Indian R.W. Co. v. Kalidas Mukerjee.....	[1901] A.C. 396.....	418, 609
Eaton v. Boston and Lowell R.R. Co....	11 Allen 500.....	609
Eaton (T.) Co. v. Sangster.....	24 S.C.R. 708.....	551
Eddy v. Village of Ellicottville.....	35 N.Y. App. Div. 256.....	562
Eddystone Marine Insurance Co., In re..	[1893] 3 Ch. 9.....	380, 382, 393
Edinburgh and Glasgow R.W. Co. v. Magistrates of Linlithgow.....	3 Macq. Sc. App. Cas. 691, at pp. 717, 730.....	356
Edmanson v. Thompson and Blakey....	8 Jur N.S. 235.....	515
Elias v. Griffith.....	46 L.J.N.S. Ch. 806.....	322, 324
Eliot v. Mayor, etc., of Bristol.....	71 L.T. 659, at p. 663.....	174
Ellis and Town of Renfrew, Re.....	21 O.L.R. 74.....	95, 528, 536, 537, 538
Emma Silver Mining Co. v. Grant.....	11 Ch.D. 918.....	128
Enoch and Zaretsky Bock & Co.'s Arbitration, In re.....	[1910] 1 K.B. 327, 332.....	312, 384
Erdman v. Town of Walkerton.....	22 O.R. 693, 20 A.R. 444.....	323, 324
Erlanger v. New Sombrero Phosphate Co.....	3 App. Cas. 1218.....	128, 434
Ernest v. Nicholls.....	6 H.L.C. 401.....	10
Essery v. Court Pride of the Dominion..	2 O.R. 596.....	306, 307, 311
Ettamass, Ex p.....	2 B.C.R. 232.....	40
Evans v. Buck.....	4 Ch.D. 432.....	164
Evans v. Davis.....	10 Ch.D. 747, 27 W.R. 285.....	163, 164, 177
Ewing v. Toronto R.W. Co.....	24 O.R. 694.....	422

NAME OF CASE.	WHERE REPORTED.	PAGE
Eykyn's Trusts, In re.....	6 Ch.D. 115.....	117
Eyre v. Highway Board of New Forest Union.....	8 Times L.R. 648.....	453

## F.

Fairchild v. Ferguson.....	21 S.C.R. 484.....	405
Falk v. Moebis.....	127 U.S. 597.....	405
Fancourt v. Heaven.....	18 O.L.R. 492.....	585, 599
Farmers Bank v. Big Cities Realty and Agency Co.....	15 O.W.R. 241, 1 O.W.N. 397...	396, 404
Faulds v. Harper.....	11 S.C.R. 639.....	130
Fearns v. Young.....	10 Ves. 184.....	150
Ferguson v. Troop.....	17 S.C.R. 527.....	261
Ferrand v. Milligan.....	7 Q.B. 730.....	136
Ferrier v. Trépannier.....	24 S.C.R. 86.....	549
Fewings v. Grand Trunk R.W. Co.....	14 O.W.R. 586, 1 O.W.N. 1.....	422
Field v. Court Hope of Ancient Order of Foresters.....	26 Gr. 467.....	307
Firth v. Bowling Iron Co.....	3 C.P.D. 254.....	550
Fisher v. Fisher.....	25 A.R. 108.....	631
Fisher and Village of Carman, Re.....	16 Man. L.R. 560, at p. 562.....	569, 570
Fitzgerald v. Fauconberge.....	Fitzg. 207, at p. 214.....	341
Flatt and United Counties of Prescott and Russell, In re.....	18 A.R. 1.....	497, 501, 502, 503
Fleckner v. Bank of the United States..	21 U.S.R. (8 Wheaton) 338, at p. 351.....	29
Fletcher v. Pullen.....	16 Atl. Repr. 887.....	511
Florence Mining Co. v. Cobalt Lake Mining Co.....	18 O.L.R. 275.....	507
Foley v. Township of East Flamborough	26 A.R. 43, at p. 51.....	237
Ford v. Whitmarsh.....	Hurl. & Walm. 53.....	510, 515
Forster v. Forster.....	14 O.W.R. 796, 1 O.W.N. 93.....	456
Fortescue v. Barnett.....	3 My. & K. 36.....	635
Forwood v. City of Toronto.....	22 O.R. 351.....	422
Foster v. Anderson.....	16 O.L.R. 565.....	655
Foster v. Toronto R.W. Co.....	31 O.R. 1.....	522, 528, 534
Fontaine v. Carmarthen R.W. Co.....	L.R. 5 Eq. 316.....	110
Fox v. Government of Newfoundland..	[1898] A.C. 667, 672.....	506
Fox v. Lamarche.....	13 Rev. Leg. N.S. 67.....	214, 219
Frankland v. McGusty.....	1 Knapp 274.....	511
Fraser v. Ryan.....	24 A.R. 441.....	648
Freeman, Re.....	2 E. & A. 109.....	355
French v. State.....	12 Ind. 670.....	336, 342
Frost v. Knight.....	L.R. 7 Ex. 111.....	621
Fryer v. Wiseman.....	24 W.R. 205, 45 L.J.Ch. 199.....	148

## G.

Gagnon v. Dunbar.....	Q.R. 20 S.C. 515.....	224
Galloway's Case.....	18 Jur. 885.....	14
Gandy v. Gandy.....	30 Ch.D. 57.....	486
Gardiner v. Gardiner.....	2 O.S. 554.....	51
Garland v. Jacomb.....	L.R. 8 Ex. 216.....	511
Geaves v. Price.....	32 L.J.N.S.P. 113.....	297, 298, 300
Gee v. Metropolitan R.W. Co.....	L.R. 8 Q.B. 161, 175.....	551
Geere v. Mare.....	2 H. & C. 339, 346.....	252
Gendron v. Labranche.....	Q.R. 3 S.C. 83.....	225
General Electric Co. v. Victoria Electric Light Co. of Lindsay.....	16 P.R. 529.....	396
General Property Investment Co. v. Matheson's Trustees.....	16 Rettie 282.....	251
Gent v. Harrison.....	69 L.T.N.S. 307.....	163, 164



NAME OF CASE.	WHERE REPORTED.	PAGE
Gibson v. Barton.....	L.R. 10 Q.B. 329, at p. 338.....	435
Gibson v. Young.....	21 N.S.W.L.R. 7, at p. 12.....	563
Gilbert v. Brown.....	15 O.W.R. 673, at p. 679, 1 O.W.N. 652, 654.....	544
Gilbert v. Corporation of Trinity House.	17 Q.B.D. 795, 800.....	506
Gilchrist v. Township of Carden.....	26 C.P. 1.....	237
Gildea v. Metropolitan Street R. Co.....	58 N.Y. App. Div. 528, 529.....	423
Giles and Town of Almonte, Re.....	1 O.W.N. 698.....	86
Gillett v. Peppercorne.....	3 Beav. 78.....	319, 326, 328
Gillies v. Colton.....	22 Gr. 123, 129, 132.....	176
Gilmore v. Federal Street and Pleasant Valley Passenger R. Co.....	153 Pa. St. 31.....	423
Girardot v. Welton.....	19 P.R. 162.....	402, 403, 462
Glasier v. Rolls.....	42 Ch.D. 436, 442.....	434
Gloucester, Township of, v. Canada Atlantic R.W. Co.....	3 O.L.R. 85, 4 O.L.R. 262.....	137
Gluckstein v. Barnes.....	[1900] A.C. 240, 257..... 128, 133, 383, 435	
Gonville v. Hay.....	21 R.P.C. 49.....	176
Gosling v. Gosling.....	3 Drew. 335.....	117
Gothard v. Clarke.....	5 C.P.D. 253.....	363
Gowan v. Christie.....	L.R. 2 Sc. App. 273.....	473
Grand Trunk R.W. Co. v. McMillan.....	16 S.C.R. 543, at p. 549.....	182
Grand Trunk R.W. Co. v. Vogel.....	11 S.C.R. 612.....	182
Grant v. Gold Exploration and Develop- ment Syndicate.....	[1900] 1 Q.B. 233.....	435
Grant v. Grant.....	34 Beav. 623.....	117
Gray v. Billington.....	21 C.P. 288.....	170
Great Northern R.W. Co. v. Manchester Sheffield and Lincolnshire R.W. Co.....	5 DeG. & S. 138.....	489
Great Western R.W. Co. v. Braid.....	1 Moo. P.C.N.S. 101.....	549
Greaves v. Ashlin.....	3 Camp. 426.....	618
Green v. Farmer.....	4 Burr. 2214, 2220, 2221.....	462
Green v. Watson.....	2 O.R. 627, 634.....	171
Greenslade v. Dower.....	7 B. & C. 635.....	511
Gresham Life Assurance Society, In re.....	L.R. 8 Ch. 446... 153, 155, 156, 158	
Grey v. Newark Plank Road Co.....	65 N.J. Law 51.....	104
Greystock and Municipality of Otona- bee, In re.....	12 U.C.R. 458.....	567, 568, 573
Griffin v. Houlder Line Limited.....	20 Times L.R. 255.....	234
Griffin, In re.....	[1899] 1 Ch. 408.....	119
Griffith, In re.....	7 Times L.R. 268.....	256
Gwatkin v. Harrison.....	36 U.C.R. 478.....	460

## H.

Hadley v. Baxendale.....	9 Ex. 341.....	183
Hadley v. Taylor.....	L.R. 1 C.P. 53.....	141
Haggerty v. City of Victoria.....	4 B.C.R. 163.....	570
Haight v. Hamilton Street R.W. Co.....	29 O.R. 279, at p. 281.....	422
Halbot v. Lens.....	[1901] 1 Ch. 344.....	110
Hall v. Conder.....	2 C.B.N.S. 22.....	169, 170
Hall v. Duke of Norfolk.....	[1900] 2 Ch. 493.....	548
Hall v. North Eastern R.W. Co.....	L.R. 10 Q.B. 437.....	579
Hall, In re, Branston v. Weightman.....	35 Ch.D. 551.....	271
Hall, Re.....	8 A.R. 135.....	350, 358
Hamilton v. Cousineau.....	19 A.R. 203.....	585, 592, 593, 599
Hamilton v. Desjardins Canal Co.....	1 Gr. 1.....	379, 383
Hamlyn & Co. v. Wood & Co.....	[1891] 2 K.B. 488.....	581
Hammersmith R.W. Co. v. Brand.....	L.R. 4 H.L. 171.....	21
Hardaker v. Idle District Council.....	[1896] 1 Q.B. 335.....	548
Harmon v. Park.....	7 Q.B.D. 369.....	363

NAME OF CASE.	WHERE REPORTED.	PAGE
Harper, Re.....	23 O.R. 63... 329, 332, 334, 349, ..... 350, 351, 352, 355, 360, 361	349,
Harris v. Smith.....	40 U.C.R. 33, 61.....	409
Haseldine, In re, Grange v. Sturdy.....	31 Ch.D. 511, 518.....	266
Hattersley v. Earl of Shelburne.....	31 L.J. Ch. 873.....	383
Hayne v. Maltby.....	3 T.R. 438.....	169, 170, 175
Healey v. Corporation of Batley.....	L.R. 19 Eq. 375.....	136
Heaton v. Goldney.....	[1910] 1 K.B. 754.....	243, 244
Hellier v. Hellier.....	9 P.D. 237.....	295, 300
Henderson v. Blain.....	14 P.R. 308.....	383
Henson v. Blackwell.....	4 Hare 434.....	557
Herring v. Ruskin Co-operative Asso- ciation.....	52 S.W. Repr. 331.....	156
Hesketh v. City of Toronto.....	25 A.R. 449, at p. 455.....	562
Hess Manufacturing Co., In re.....	23 S.C.R. 644.....	120, 128, 129, 130, 436, 445
Heugh v. Chamberlain.....	25 W.R. 742.....	168
Hichens v. Congreve.....	4 Russ. 562.....	134
Hickey and Town of Orillia, Re.....	17 O.L.R. 317.. 70, 85, 86, 99, 363, 365	365
Highway Advertising Co. of Canada v. Ellis.....	7 O.L.R. 504.....	129
Hill v. Crook.....	L.R. 6 H.L. 265, 276.....	265, 268, 269, 270
Hill v. Hill.....	8 O.L.R. 710.....	112, 118
Hitz v. Ahlgren.....	170 Ill. 60.....	286
Hoare v. Rennie.....	5 H. & N. 19.....	315
Hochster v. De La Tour.....	2 E. & B. 678.....	315
Hodge v. The Queen.....	9 App. Cas 117.....	507, 567, 569
Hole v. Sittingbourne and Sheerness R.W. Co.....	6 H. & N. 488, 497.....	548
Holland v. Russell.....	11 W.R. 757.....	311
Holland v. Township of York.....	7 O.L.R. 533.....	136, 137, 369, 373
Holliday v. National Telephone Co. ....	[1899] 2 Q.B. 392.....	548
Holmes v. Newcastle-upon-Tyne Free- hold Abattoir Co.....	1 Ch.D. 682.....	380, 382
Honck v. Muller.....	7 Q.B.D. 92.....	315
Hood v. Eden.....	36 S.C.R. 476.....	129, 133
Hooper v. London and North Western R.W. Co.....	50 L.J.N.S.C.L. 103.....	183
Hope v. Cust.....	1 East 53n.....	511
Hope v. International Financial Society.	4 Ch.D. 327, 339.....	251, 380, 382
Hopfensack and New York Board of Education, Re.....	173 N.Y. 321.....	286
Hopkins v. Town of Owen Sound.....	27 O.R. 43.....	136, 142
Horne v. Midland R.W. Co.....	L.R. 7 C.P. 583, at p. 590.....	183
Horner, In re, Eagleton v. Horner.....	37 Ch.D. 695.....	269
Horsev. v. Graham.....	L.R. 5 C.P. 9.....	480, 483
Houlden v. Smith.....	14 Q.B. 841.....	90
Hovey v. Whiting.....	14 S.C.R. 515, at pp. 519, 520, 532, 533, 534.....	25
Howard v. Gosset.....	10 Q.B. 359.....	339
Howard, In re, Taylor v. Howard.....	[1901] 1 Ch. 412.....	104
Howe v. Smith.....	27 Ch.D. 89.....	648, 656
Huber v. Steiner.....	2 Scott 304.....	228
Hubert v. Township of Yarmouth.....	18 O.R. 458, 467.....	136, 373
Huffman v. Township of Bayham.....	26 A.R. 514.....	238
Huggons v. Tweed.....	10 Ch.D. 359.....	397, 406
Hughes v. Percival.....	8 App. Cas. 443.....	548, 549
Hughes and Caverhill, In re.....	Q.R. 15 S.C. 225, at pp. 226, 227, 229.....	219, 225
Hull Electric Co. v. Ottawa Electric Co. .	[1902] A.C. 237.....	507
Hulton v. Jones.....	[1910] A.C. 20.....	243

NAME OF CASE.	WHERE REPORTED.	PAGE
Hunt v. Trusts and Guarantee Co. ....	10 O.L.R. 147, 148, 18 O.L.R. 351.....	206
Hunt qui tam v. Shaver.....	22 A.R. 202.....	330, 334, 337, 338
Huson and Township of South Norwich, In re.....	19 A.R. 343.....	363
Hussey v. Horne-Payne.....	4 App. Cas. 311.....	491

## I.

Imperial Starch Co., In re.....	10 O.L.R. 22.....	154, 156, 160
Indermaur v. Dames.....	L.R. 1 C.P. 274, L.R. 2 C.P. 311.....	137
Innes & Co. Limited, In re.....	[1903] 2 Ch. 254.....	129, 133
International Life Assurance Co., In re, Gibbs and West's Case.....	L.R. 10 Eq. 312.....	20
Irons v. Smallpiece.....	2 B. & Ald. 551.....	115
Ivers v. Lemieux.....	5 Q.L.R. 128.....	217, 219, 225

## J.

Jacobs v. Morris.....	[1901] 1 Ch. 261.....	511
James (F. T.) Co. v. Dominion Express Co.....	13 O.L.R. 211.....	182
Jenckes Machine Co. v. Canadian Northern R.W. Co.....	14 O.W.R. 307.....	183, 185
Jenkins v. Wilcock.....	11 C.P. 505.....	460
Jenner v. Ffinch.....	5 P.D. 106.....	294, 300
Jennings v. Van Schaick.....	108 N.Y. 530.....	141
Johnson v. Marlborough.....	2 Stark. 313.....	341
Johnson v. Midland R.W. Co.....	18 L.J.N.S. Ex. 366.....	182
Johnston, In re, Cockerell v. Earl of Essex.....	26 Ch.D. 538.....	106
Johnstone v. Milling.....	16 Q.B.D. 460.....	315, 621
Jones v. Grand Trunk R.W. Co.....	45 U.C.R. 193.....	557
Jones v. Hulton.....	[1909] 2 K.B. 444.....	243
Jones v. Imperial Bank of Canada.....	23 Gr. 262, at p. 270.....	26
Jones v. Spencer.....	77 L.T.R. 536.....	446, 451

## K.

Kaufman v. Gerson.....	[1904] 1 K.B. 591.....	228
Kearney v. London Brighton and South Coast R.W. Co.....	L.R. 5 Q.B. 411, L.R. 6 Q.B. 759..	551
Keech v. Town of Smith's Falls.....	15 O.L.R. 300, at p. 302. . .	231, 233
Keith v. Ottawa and New York R.W. Co.....	5 O.L.R. 116.....	447
Kelly v. Barton.....	26 O.R. 608, 22 A.R. 522.....	91, 563
Kelly v. City of Winnipeg.....	12 Man. L.R. 87.....	570
Kelly v. Electrical Construction Co.....	16 O.L.R. 232, at pp. 238, 239..	25
Kelly v. Metropolitan R.W. Co.....	[1895] 1 Q.B. 944.....	447
Kendrick v. Barkey.....	9 O.W.R. 356, at p. 361.....	388
Kent v. Kent.....	[1902] P. 108, at p. 112.....	300
Ker, In re.....	12 Beav. 390.....	258
Kerr and Town of Thornbury, Re.....	8 O.W.R. 451.....	523, 538, 539
Killion v. Power.....	51 Pa. St. 429.....	557
Kilpin v. Ratley.....	[1892] 1 Q.B. 582.....	115
King, The, v. Ah Jim.....	10 Can. Crim. Cas. 126.....	200
King, The, v. Boomer.....	15 O.L.R. 321.....	541, 544
King, The, v. Cooper.....	6 T.R. 509.....	40
King, The, v. Ettridge.....	[1909] 2 K.B. 24.....	471
King, The, v. Hanson.....	4 B. & Ald. 519, at p. 521.....	354
King, The, v. Inhabitants of Austrey..	6 M. & S. 319, at p. 326. . .	333, 339
King, The, v. Inhabitants of Kent.....	13 East 220.....	136
King, The, v. Inhabitants of Lindsey..	14 East 317.....	136
King, The, v. Kerrison.....	3 M. & S. 526.....	136

NAME OF CASE.	WHERE REPORTED.	PAGE
King, The, v. McLeod.....	12 Can. Crim. Cas. 73.....	41
King, The, v. Petrie.....	1 Leach 294.....	468
King, The, v. Rhodes.....	4 T.R. 220.....	40
King, The, v. Tate.....	[1908] 2 K.B. 680, 21 Cox C.C. 693.....	196, 197, 198, 199
King, The, v. Tizzard.....	9 B. & C. 418.....	532, 535
King, The, v. Townsend.....	11 Can. Crim. Cas. 153.....	189
King, The, v. Turner.....	[1910] 1 K.B. 346, at p. 362..	541, 544
King, The, v. Warren.....	2 Cr. App. R. 194, 25 Times L.R. 633.....	196, 197, 199, 200
King, The, v. Weir.....	1 B. & C. 288.....	339
King v. Wilson.....	6 Beav. 124.....	647
Kirby v. Boylston Market Association..	14 Gray 249.....	550
Kirk v. City of Toronto.....	8 O.L.R. 730.....	554
Knatchbull v. Fowle.....	1 Ch.D. 604.....	148
Knock v. Owen.....	35 S.C.R. 168, 172.....	258
Knowles v. Roberts.....	38 Ch.D. 263.....	168
Knox v. Wells.....	[1883] W.N. 58.....	104
Kruse v. Johnson.....	[1898] 2 K.B. 91, at p. 99.....	570

## L.

Lady Forrest (Murchison) Gold Mine Limited, In re.....	[1901] 1 Ch. 582.....	129
Ladywell Mining Co. v. Brookes.....	34 Ch.D. 398.....	128, 129
Lafferty v. Municipal Councils of Went- worth and Halton, In re.....	8 U.C.R. 232.....	95
Lagunas Nitrate Co. v. Lagunas Syndi- cate.....	[1899] 2 Ch. 392, 432.....	133, 434
Lake Erie and Detroit River R.W. Co. v. Sales.....	26 S.C.R. 663, 667, 676..... .....182, 186, 416, 417, 420	
Lake Ontario Navigation Co., Re.....	20 O.L.R. 191.....	376, 383, 393
Lambert v. Great Eastern R.W. Co....	79 L.J.K.B. 32, [1909] 2 K.B. 776..	562
Laugher v. Pointer.....	5 B. & C. 547, at p. 560.....	550, 555
Lawes v. Purser.....	6 E. & B. 930.....	170
Lawrence v. Great Northern R.W. Co..	16 Q.B. 643.....	356
Lawrence v. Maule.....	4 Drew. 472.....	322
Lea v. Charrington.....	5 Times L.R. 218, at p. 219.....	590
Lee v. Ashwin.....	1 Times L.R. 291.....	400
Leeds and Hanley Theatres, Re.....	[1902] 2 Ch. 809.....	133
Lemage v. Goodban.....	L.R. 1 P. & D. 57, 35 L.J.N.S.P. 28...292, 294, 296, 298, 299, 300	
Le Vesconte v. Kennedy.....	98 Printed Cases in the Court of Appeal N.S. (Ont.)...320, 321, 323	
Lewis v. Brass.....	3 Q.B.D. 667, at p. 671.....	491
Lewis v. City of Raleigh.....	77 N.C. 229.....	562
Leyfield's (Doctor) Case.....	10 Rep. 92b (2).....	341
Leykariff v. Ashford.....	12 Moo. 281.....	341
Liardet v. Hammond Electric Light and Power Co.....	31 W.R. 710.....	163, 164, 170
Lighthall v. O'Brien.....	Q.R. 6 S.C. 159.....	225
Lindsay Petroleum Co. v. Hurd.....	L.R. 5 P.C. 221.....	128
Lloyd v. Nowell.....	[1895] 2 Ch. 744.....	490, 495
London and County Banking Co. v. London and River Plate Bank.....	21 Q.B.D. 535, at p. 542....	630, 634
London Celluloid Co., In re.....	39 Ch.D. 190.....	380
London, City of, v. Goldsmith.....	16 S.C.R. 231.....	232
Long v. Hancock.....	12 S.C.R. 532.....	21
Lovell v. Hicks.....	2 Y. & C. Ex. 46, 472.....	169
Lovitt v. The King.....	43 S.C.R. 106, 140.....	485
Low v. Carter.....	1 Beav. 426.....	116
Lowery v. Walker.....	[1910] 1 K.B. 173.....	137, 140



NAME OF CASE.	WHERE REPORTED.	PAGE
Lowther v. Lowther.....	13 Ves. 95, at p. 103.....	327
Lucas v. Tarleton.....	3 H. & N. 116.....	521
Lucas v. Township of Moore.....	43 U.C.R. 334, at p. 339.....	237
Lyden v. McGee.....	16 O.R. 105, at p. 108.....	589
Lydney and Wigpool Iron Ore Co. v. Bird.....	33 Ch.D. 85.....	128
M.		
McArthur v. Eagleson.....	43 U.C.R. 406.....	285
McArthur v. Lord Seaforth.....	2 Taunt. 257.....	620
McCall, In re.....	2 U.C.L.J.N.S. 16.....	189
McCleave v. City of Moncton.....	32 S.C.R. 106.....	563
McCormack v. Toronto R.W. Co.....	13 O.L.R. 656.....	556, 558
McDonald v. Dickenson.....	24 A.R. 31, at p. 42.....	234
Macdonald and Mail Printing and Pub- lishing Co., In re.....	6 P.R. 309...153, 155, 156, 159, 160 L.R. 20 Eq. 383.....	128, 129
MacDougall v. Gardiner.....	10 P.R. 247, 252.....	109, 110, 111
McGill v. Grand Trunk R.W. Co.....	19 A.R. 245.....	182, 185
McGrath and Town of Durham, In re...	17 O.L.R. 514, at p. 516.....	501, 523, 537
McHardy v. Townships of Ellice and Downie.....	1 A.R. 628.....	369
McIntosh v. Leckie.....	13 O.L.R. 54.....	472, 473
McIntosh v. Reiplinger.....	20 Rev. Leg. O.S. 130.....	209, 219
McKay v. Bruce.....	20 O.R. 709, 717.....	410
Mackett v. Commissioners of Herne Bay.	35 L.T.R. 202.....	136
McKillop, Township of, v. Township of Logan.....	29 S.C.R. 702.....	501
Mackintosh v. Stuart.....	36 Beav. 21.....	630
MacLae v. Sutherland.....	3 E. & B. 1.....	14
McLeod v. Lawson.....	8 O.W.R. 213.....	473
McManus v. Inhabitants of Weston...	164 Mass. 263, at p. 270.....	563
McMillan v. Grand Trunk R.W. Co.....	12 O.R. 103, 15 A.R. 14.....	182
McMurray v. Northern R.W. Co.....	22 Gr. 476.....	129
McNab, Township of, and County of Renfrew, Re.....	6 O.W.R. 523.....	369
McNiroy v. Town of Bracebridge.....	10 O.L.R. 360.....	137, 143
McPherson v. Trustees S.S. No. 7 Usborne.....	1 O.L.R. 261, at p. 264.....	47
McSorley v. Mayor, etc., of the City of St. John.....	6 S.C.R. 531, at p. 548.....	563
Madill v. Township of Caledon.....	3 O.L.R. 66.....	137
Mahoney v. Libbey.....	123 Mass. 20.....	550
Mahony v. Waterford Limerick and Western R.W. Co.....	[1900] 2 I.R. 273.....	183
Mains v. Inhabitants of Fort Fairfield..	99 Me. 177.....	563
Mallet v. Great Eastern R.W. Co. ....	[1899] 1 Q.B. 309.....	182
Malone v. Laskey.....	[1907] 2 K.B. 141.....	548
Marsh v. Milligan.....	3 Jur. N.S. 979.....	489
Marshall v. Crutwell.....	L.R. 20 Eq. 328.....	117, 118
Marshall v. Berridge.....	19 Ch.D. 233.....	490
Martin v. Great Indian Peninsular R.W. Co.....	L.R. 3 Ex. 9.....183, 416, 419, 420	511, 512
Martyn v. Gray.....	14 C.B.N.S. 824.....	336
Master v. Miller.....	1 Sm. L.C., 11th ed., p. 767.....	332, 336
Mattei v. Vautro.....	78 L.T.R. 682.....	148
Mauldin v. City Council of Greenville..	33 S. Car. 1.....	506
Maxwell v. Township of Clarke.....	4 A.R. 460, at p. 465.....	238
Megson v. Hindle.....	15 Ch.D. 198.....	267, 268, 272
Merchants Despatch Transportation Co. v. Hately.....	14 S.C.R. 572.....	182

NAME OF CASE.	WHERE REPORTED.	PAGE
Mersey Docks and Harbour Board v. Henderson.....	13 App. Cas. 595, 599.....	183
Mersey Docks Trustees v. Gibbs.....	L.R. 1 H.L. 93, at p. 110.....	562
Mersey Steel Co. v. Naylor Benzon & Co. ....	9 App. Cas. 434.....	315
Methuen v. Methuen.....	2 Philim. 416.....	299
Meunier, In re.....	[1894] 2 Q.B. 415.....	196, 197, 198
Meux v. Great Eastern R.W. Co. ....	[1895] 2 Q.B. 387, at p. 394.....	420
Mews v. Mews.....	15 Beav. 529.....	631
Michael v. Hart.....	[1901] 2 K.B. 867, [1902] 1 K.B. 482..488, 614, 617, 618, 619, 621	
Midland Great Western R.W. Co. v. Gordon.....	16 M. & W. 804, 808.....	489
Miller v. Manwaring.....	Cro. Car. 397, at p. 399.....	341
Miller, Re, Daniel v. Daniel.....	61 L.T.R. 365.....	107
Mills v. Carson.....	10 R.P.C. 9.....	169
Minns v. Village of Omemee.....	8 O.L.R. 508.....	233
Miron v. McCabe, In re.....	4 P.R. 171, at p. 174.....	402
Mitchell and Municipal Corporation of Campbellford, Re.....	16 O.L.R. 578.....	500
Mix v. Beach.....	46 Ill. 311.....	647
Mollwo March & Co. v. Court of Wards..	L.R. 4 P.C. 419, at p. 435.....	511
Molony v. Kernan.....	2 Dr. & War. 31.....	327
Montgomery v. Ryan.....	16 O.L.R. 75.....	26, 33
Moorcock, The.....	14 P.D. 64.....	580, 581
Moore v. City of Toronto.....	9 O.W.R. 665.....	234
Moore v. Kirkland.....	5 C.P. 452.....	460, 461
Moore v. Ullcoats Mining Co.....	[1908] 1 Ch. 575, at p. 587.....	164
Moorhouse v. Linney.....	15 Q.B.D. 273.....	363
Moriarty v. Harris.....	8 O.L.R. 251, 10 O.L.R. 610.....	87, 91
Morgan v. Nicholl.....	L.R. 2 C.P. 117, 118.....	324
Morgan v. Thorne.....	7 M. & W. 400, at p. 409.....	147, 148
Morin v. Bédard.....	17 Q.L.R. 30.....	214, 219
Morton and City of St. Thomas, In re..	6 A.R. 323.....	411
Mosely v. Koffyfontein Mines Limited..	[1904] 2 Ch. 108.....	376, 383, 393
Moulton and Haldimand, Re.....	12 A.R. 503.....	369, 374
Mullen v. St. John.....	57 N.Y. 567.....	550
Murphy v. Stewart.....	12 Rev. Leg. O.S. 501.....	
	.....204, 217, 219, 225	
Muschamp v. Lancaster and Preston Junction R.W. Co.....	8 M. & W. 421.....	182
Mykel v. Doyle.....	45 U.C.R. 65..407, 408, 409, 410, 411	

## N.

Nadel v. Martin.....	20 R.P.C. 721, 735.....	169
Nassau Steam Press v. Tyler.....	70 L.T.R. 376.....	396, 404
National Bank of Australasia v. Cherry..	L.R. 3 P.C. 299, at p. 307.....	25
Nelson v. Liverpool Brewery Co.....	2 C.P.D. 311.....	548
New Chile Gold Mining Co., In re.....	38 Ch.D. 475.....	380
Newby v. Sharpe.....	8 Ch.D. 39, at p. 51.....	261
Newell v. National Provincial Bank of England.....	1 C.P.D. 496, 501.....	403
Newton v. Holford.....	6 Q.B. 921, 926.....	356
Nichols v. Lynn and Boston R.R. Co....	168 Mass. 528..601, 608, 609, 610, 611	
Nickalls, In the Goods of.....	34 L.J.N.S.P. 103.....	300
Nixon v. Brownlow.....	2 H. & N. 455.....	489
Norman v. Mitchell.....	5 DeG. M. & G. 648.....	489
North v. Percival.....	[1898] 2 Ch. 128, at p. 132.....	491
North Australian Territory Co., In re, Archer's Case.....	[1892] 1 Ch. 322, 337, 341.....	128
North Chicago Street R.R. Co. v. Cook..	145 Ill. 551.....	609, 612
Northcote v. Pulsford.....	44 L.J.N.S.C.P. 217.....	363

NAME OF CASE.	WHERE REPORTED.	PAGE
North Dorchester, Township of, v. County of Middlesex.....	4 O.R. 658, at p. 660.....	369
North Eastern R.W. Co. v. Hastings...	[1900] A.C. 260.....	490
North-West Transportation Co. v. McKenzie.....	25 S.C.R. 38, at p. 44.....	183
Noton v. Brooks.....	7 H. & N. 499.....	170

## O.

O'Brien v. O'Brien.....	4 O.R. 450.....	631
O'Brien v. Michigan Central R.R. Co...	19 O.L.R. 345.....	557
O'Connor v. Townships of Otonabee and Douro.....	35 U.C.R. 73.....	366, 368, 370, 374
Ogdens Limited v. Nelson.....	[1903] 2 K.B. 287, [1904] 2 K.B. 410, [1905] A.C. 109.....	580, 581
Oldham v. Langmead.....	3 T.R. 439.....	175
Olympia Limited, In re.....	[1898] 2 Ch. 153.....	128
O'Meara and City of Ottawa, Re.....	11 O.R. 603, at p. 607.....	567
Ooregum Gold Mining Co. of India v. Roper.....	[1892] A.C. 125.....	376, 380, 382, 383, 392, 393
Orangeville Local Option By-law, Re..	20 O.L.R. 476, at pp. 477, 478...	83
Osborn v. Union Ferry Co. of Brooklyn..	53 Barb. 629.....	141
Osgoode, Township of, v. York.....	23 S.C.R. 282.....	501
Osterhout v. Fox.....	14 O.L.R. 599, at p. 604.....	402
Ottos Kopje Diamond Mines Ltd., In re.	[1893] 1 Ch. 618.....	618
Owen v. Wilkinson.....	5 C.B.N.S. 526.....	402
Owens v. Taylor.....	29 Gr. 210.....	171
Oxford v. Provand.....	L.R. 2 P.C. 135.....	475, 491

## P.

Page v. Austin.....	26 C.P. 110.....	460
Page v. Beauchamp.....	Q.R. 20 S.C. 220.....	218
Palmer v. Jones.....	22 W.R. 909.....	150
Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh.....	24 Times L.R. 884.....	589
Panton and Cramp Steel Co., In re.....	9 O.L.R. 3.....	155, 160
Pariente v. Lubbock.....	20 Beav. 588, at p. 592.....	326
Partington, Ex p.....	2 D. & L. 650, 13 M. & W. 679, 684.....	357
Payne v. Marshall.....	18 O.R. 488.....	116, 118
Pearce v. Watts.....	L.R. 20 Eq. 492.....	490
Peacock v. Bell and Kendal.....	1 Saunders 73.....	189
Peerless, In re.....	1 Q.B. 143.....	189, 191
Penny v. Wimbledon Urban District Council.....	[1898] 2 Q.B. 212, [1899] 2 Q.B. 72.....	545, 548, 554, 555
Penrose v. Martyr.....	E. B. & E. 499.....	396, 404
Peoria v. Simpson.....	110 Ill. 294, at p. 301.....	142
Perkins v. Slater.....	45 L.J.N.S. Ch. 224.....	322
Petchell, In the Goods of.....	L.R. 3 P. & D. 153.....	292, 293, 296, 298, 299
Pfau v. Reynolds.....	53 Ill. 212.....	141
Phené's Trusts, In re.....	L.R. 5 Ch. 139.....	287
Pickard v. Smith.....	10 C.B.N.S. 470.....	548
Pickering v. Ilfracombe R.W. Co.....	L.R. 3 C.P. 235, at p. 249.....	25
Pickett and Township of Wainfleet, Re..	28 O.R. 464, 467.....	75, 85, 99
Picksley v. Starr.....	149 N.Y. 432.....	631
Pictou, Municipality of, v. Geldert.....	[1893] A.C. 524, at p. 531.....	234, 235
Pidding v. Franks.....	1 Macn. & G. 56.....	174
Piggott v. Birtles.....	1 M. & W. 441, at p. 451.....	520, 521
Piggott v. Toogood.....	[1904] W.N. 130.....	148

NAME OF CASE.	WHERE REPORTED.	PAGE
Pigot's Case.....	11 Coke's Rep. 26b.....	18, 340
Planché v. Colburn.....	8 Bing. 14.....	315
Plant v. Bourne.....	[1897] 2 Ch. 281.....	480
Platte Land Co. v. Hubbard.....	12 Col. App. 465.....	647
Plenty v. West.....	1 Robertson Eccl. R. 264.....	301
Port Arthur and Rainy River Provincial Election, In re.....	14 O.L.R. 345, 358.....	532
Portland, City of, v. Richardson.....	54 Me. 46.....	141
Pott v. Eyton.....	3 C.B. 32.....	516
Pow v. Township of West Oxford.....	11 O.W.R. 115, 13 O.W.R. 162..	93
Prendergast v. Turton.....	1 Y. & C.C.C. 98, at p. 110.....	655
Prentice v. Elliott.....	5 M. & W. 606.....	314
Price v. Union Lighterage Co. ....	[1904] 1 K.B. 412.....	183
Price v. Union Lighterage Co. ....	20 Times L.R. 177.....	420
Proulx v. Klineberg.....	Q.R. 30 S.C. 1.....	218
Prudential Assurance Co. v. Edmonds..	2 App. Cas. 487.....	287

## Q.

Quarman v. Burnett.....	6 M. & W. 499, 510.....	550, 555
Queen, The, v. Blythe.....	1 Can. Crim. Cas. 263, 282.....	193, 196
Queen, The, v. Burtress.....	3 Can. Crim. Cas. 536.....	189
Queen, The, v. Caledonian R.W. Co. .	16 Q.B. 19, at p. 31.....	356
Queen, The, v. Corporation of Bangor..	18 Q.B.D. 349.....	532
Queen, The, v. Douglas.....	[1898] 1 Q.B. 560, at p. 563.....	532
Queen, The, v. Dupont.....	4 Can. Crim. Cas. 566.....	471
Queen, The, v. Grenier.....	30 S.C.R. 42.....	182
Queen, The, v. Inhabitants of the Parish of St. George's Bloomsbury .....	4 E. & B. 520.....	189, 191
Queen, The, v. Lalonde.....	9 Can. Crim. Cas. 501.....	40
Queen, The, v. Lofthouse and Wilson..	L.R. 1 Q.B. 433.....	363
Queen, The, v. Lyons.....	2 Can. Crim. Cas. 218.....	188, 190
Queen, The, v. McKenzie.....	23 N.S.R. 6.....	191
Queen, The, v. McNutt.....	4 Can. Crim. Cas. 392, at p. 398 .....	541, 543
Queen, The, v. Martin.....	2 Q.B. 1037, at p. 1041.....	189
Queen, The, v. Payn.....	34 L.J.N.S.Q.B. 59.....	532
Queen, The, v. Richards, Bird, and Others.....	5 Q.B. 926.....	42
Queen, The, v. Shepherd.....	L.R. 1 C.C.R. 118.....	468
Queen, The, v. Stock.....	8 A. & E. 405.....	354, 361
Quinn v. Crimmings.....	42 L.R.A. 101.....	548
Quinn v. Leatham.....	[1901] A.C. 495, at p. 506.....	174

## R.

Randall v. Atkinson.....	30 O.R. 242, 620.....	324
Reedie v. London and North Western R.W. Co. ....	4 Ex. 244, at p. 251.....	547
Reeves v. Reeves.....	[1909] 2 I.R. 521.....	300
Regina v. Andrews.....	12 O.R. 184, at p. 191.....	197
Regina v. Beckwith.....	8 C.P. 274.....	196, 197, 199
Regina v. Beemer.....	15 O.R. 266.....	332
Regina v. Brady.....	12 O.R. 358.....	344
Regina v. Brown.....	16 O.R. 41.....	347
Regina v. Caswell.....	20 C.P. 275.....	468
Regina v. Clancey.....	7 P.R. 35, at p. 37.....	188
Regina v. Corporation of Yorkville..	22 C.P. 431.....	369
Regina v. Deane.....	10 U.C.R. 464.....	40
Regina v. Edgar.....	15 O.R. 142.....	346
Regina v. Fee.....	13 O.R. 590, at p. 592.....	353
Regina v. Fellows.....	19 U.C.R. 48.....	197
Regina v. Lavin.....	12 P.R. 642.....	40
Regina v. Lynch.....	12 O.R. 372.....	344



NAME OF CASE.	WHERE REPORTED.	PAGE
Regina v. McAuley.....	14 O.R. 643.....	334, 351, 352
Regina v. McBride.....	26 O.R. 639, at p. 640.....	197
Regina v. MacKenzie.....	6 O.R. 165.....	344
Regina v. Manktelow.....	22 L.J.M.C. 115, 6 Cox C.C. 143, Dears C.C. 159.....	195
Regina v. Murray.....	28 O.R. 549, at p. 551.....	532
Regina v. Olifier.....	10 Cox C.C. 402.....	195
Regina v. Randolph.....	32 O.R. 212.....	41
Regina v. Shaw.....	23 U.C.R. 616.....	189
Regina v. Stubbs.....	7 Cox C.C. 48.....	199
Regina v. Woodhall.....	12 Cox C.C. 240.....	40
Regina v. Wyatt.....	2 Ld. Raym. 1189.....	339
Regina ex rel. Chambers v. Allison.....	1 C.L.J.N.S. 244.....	532
Regina ex rel. Harris v. Bradburn.....	6 P.R. 308, at p. 309.....	86
Regina ex rel. Regis v. Cusac.....	6 P.R. 303.....	86, 363
Reid v. Diebel.....	Not reported (MacMahon, J., May, 1909).....	325
Reiffenstein v. Hooper.....	36 U.C.R. 295.....	557
Rex v. Ackers.....	1 O.W.N. 780, 21 O.L.R. 187.....	345
Rex v. Akers.....	1 O.W.N. 585, 672, 15 O.W.R. 679.....	187, 329, 356, 359
Rex v. Beboning.....	17 O.L.R. 23.....	40
Rex v. Collins.....	C.A., 31st May, 1901 (Ont.).....	337, 338
Rex v. David Davis.....	7 C. & P. 319.....	336, 342
Rex v. Dealtry.....	40 C.L.J. 38.....	346
Rex v. Degan.....	17 O.L.R. 366.....	330, 332, 344
Rex v. Drummond.....	10 O.L.R. 546.....	348
Rex v. Duering.....	2 O.L.R. 593.....	189, 190
Rex v. Dungey.....	2 O.L.R. 223.....	41
Rex v. Farrell.....	20 O.L.R. 182, 190.....	348, 349
Rex v. Graf.....	19 O.L.R. 238.....	41, 333
Rex v. Hayward.....	5 O.L.R. 65.....	41
Rex v. Holmes.....	14 O.L.R. 124, at p. 128.....	189
Rex v. Holmes.....	14 O.W.R. 419, at p. 421.....	194
Rex v. Jarvis.....	20 Cox C.C. 249, 251.....	193
Rex v. Leach.....	17 O.L.R. 643, at p. 651.....	334, 347, 353, 356
Rex v. Legros.....	17 O.L.R. 425.....	347
Rex v. Lowery.....	15 O.L.R. 182.....	41, 351, 352
Rex v. Miller.....	19 O.L.R. 125, 288.....	329, 356, 357, 359
Rex v. Morgan.....	2 O.L.R. 413, 3 O.L.R. 356.....	41
Rex v. Nelson.....	18 O.L.R. 484.....	20, 41
Rex v. Nurse.....	7 O.L.R. 418.....	346
Rex v. Robinson.....	14 O.L.R. 519.....	358, 359
Rex v. Skinner.....	5 Esp. 219.....	136
Rex v. Teasdale.....	20 O.L.R. 382.....	329, 332, 334, 347, 349, 352, 356, 360, 361
Rex v. Van Norman.....	19 O.L.R. 447, at p. 456.....	353
Rex v. Yaldon.....	17 O.L.R. 179.....	348
Rex ex rel. McLeod v. Bathurst.....	5 O.L.R. 573.....	86
Rhodes v. Moules.....	[1895] 1 Ch. 236.....	512
Rhodes v. Swithenbank.....	22 Q.B.D. 577.....	148
Rhymney R.W. Co. v. Brecon and Merthyr Tydfil Junction R.W. Co..	[1900] W.N. 169.....	315
Rice v. Gunn.....	4 O.R. 579, at p. 589.....	222
Rice v. Town of Whitby.....	25 A.R. 191, at p. 198.....	238
Richards v. The Queen's Proctor.....	18 Jur. 540.....	297
Richardson v. Canadian Pacific R.W. Co. ....	19 O.R. 369, at p. 377.....	182
Richardson, Re, Weston v. Richardson..	47 L.T.N.S. 514.....	630, 634
Richmond, City of, v. Long's Adminis- trators.....	17 Grattan 375.....	563

NAME OF CASE.	WHERE REPORTED.	PAGE
Ridgway v. Wharton.....	6 H.L.C. 238.....	491
Rishton v. Cobb.....	5 My. & Cr. 145.....	100, 102, 103, 104, 105
Ritchie v. Vermillion Mining Co.....	1 O.W.R. 624.....	10
Ritchie v. Vermillion Mining Co.....	1 O.L.R. 654, 4 O.L.R. 588.....	383
Robbins v. Chicago City.....	4 Wall (S.C.) 657.....	141
Roberts v. Climie.....	46 U.C.R. 264.....	87, 91
Roberts v. Mitchell.....	21 A.R. 433.....	548, 550
Robertson v. Grand Trunk R.W. Co....	24 S.C.R. 611.....	182
Robertson v. Grand Trunk R.W. Co....	21 A.R. 204, at pp. 208, 219....	417
Robinson v. Mills.....	19 O.L.R. 162, at pp. 172, 173..	236
Robinson v. Mollett.....	L.R. 7 H.L. 802, at pp. 815, 836, 838.....	327
Robinson v. Page.....	3 Russ. 114.....	491
Robson, In re, Robson v. Hamilton....	[1891] 2 Ch. 559.....	106
Rock v. Pursell.....	84 L.T.J. 45.....	168
Rodgers v. Parker.....	18 C.B. 112.....	521
Roe v. Mutual Loan Fund Limited.....	19 Q.B.D. 347.....	486
Rogers v. Murray.....	110 N.Y. 658.....	511
Rolland v. La Caisse d'Economie Notre- Dame de Quebec.....	24 S.C.R. 405, at pp. 408, 409...	25
Rossiter v. Miller.....	5 Ch.D. 648, 3 App. Cas. 1124..	486, 491, 492, 494, 495
Rounds v. Town of Stratford.....	25 C.P. 123, at p. 128.....	237
Rouquette v. Overmann.....	L.R. 10 Q.B. 525, at p. 536....	509
Rowe v. Corporation of Leeds and Gren- ville.....	13 C.P. 515.....	234
Royal British Bank v. Turquand.....	5 E. & B. 248, 6 E. & B. 327...	14
Ruddiman & Co. v. Smith.....	60 L.T.R. 708.....	557, 560
Ruethel Mining Co. v. Thorpe.....	9 O.W.R. 942, at p. 948....	435, 436
Russell v. Hubbard.....	6 Barb. S.C.N.Y. 654.....	338
Russell v. Wakefield Waterworks Co....	L.R. 20 Eq. 474.....	379, 380, 383
Ryan, Re.....	32 O.R. 224.....	112, 116, 118
Rylands v. Fletcher.....	L.R. 3 H.L. 330.....	558
Rymal v. Ashberry.....	12 C.P. 339, at p. 342.....	51
S.		
St. Louis Iron Mountain and Southern R.W. Co. v. Southern Express Co....	117 U.S. 1.....	417
St. Thomas's Hospital, Governors of, v. Charing Cross R.W. Co.....	1 J. & H. 400, 404.....	464, 467
Ste. Louise, Corporation of, v. Chouinard	Q.R. 5 Q.B. 362.....	570
Salford, Mayor, etc., of, v. Lever.....	[1891] 1 Q.B. 168.....	435
Salomon v. Salomon & Co.....	[1897] A.C. 22.....	23, 129, 133, 426, 434, 435, 443
Salt v. Scott Hall.....	[1903] 2 K.B. 245, at p. 249....	567
Salter and Township of Beckwith, In re..	4 O.L.R. 51.....	94, 99
Saltfleet, Local Option By-law of the Township of, In re.....	16 O.L.R. 293, 302.....	75, 83
Sandback Charity Trustees v. North Staffordshire R.W. Co.....	3 Q.B.D. 1.....	355
Sandilands v. Marsh.....	2 B. & Ald. 673.....	512
Sangster v. T. Eaton Co.....	25 O.R. 78, 21 A.R. 624.....	551, 557
Sangster v. Town of Goderich.....	13 O.W.R. 419, at p. 421....	231, 234
Savereux v. Tourangeau.....	16 O.L.R. 600.....	479, 480
Savill Brothers Limited v. Bethell.....	[1902] 2 Ch. 523.....	490
Sawers v. City of Toronto.....	4 O.L.R. 624.....	502
Scarf v. Jardine.....	7 App. Cas. 345.....	516
Schmidt v. Town of Berlin.....	26 O.R. 54, at p. 58.....	563
Schulze v. Great Eastern R.W. Co.....	19 Q.B.D. 30.....	183
Scott v. London and St. Katherine Docks Co.....	3 H. & C. 596.....	551, 557

NAME OF CASE.	WHERE REPORTED.	PAGE
Selby v. Browne.....	7 Q.B. 620.....	315
Selsey (Lord) v. Rhoades.....	2 Sim. & Stu. 41.....	327
Sewell v. King.....	14 Ch.D. 179.....	635
Shaver v. Cotton.....	23 A.R. 426.....	461
Sherratt v. Merchants Bank of Canada..	21 A.R. 473.....	629, 630, 635
Shields v. Town of Durham.....	116 N.C. 394.....	562
Shirreff v. Wilks.....	1 East 48, 53.....	511
Shoreditch, Mayor, etc., of, v. Bull....	20 Times L.R. 254.....	232, 239
Sibley v. Fisher.....	7 A. & E. 444.....	341
Siggers v. Evans.....	5 E. & B. 367.....	630, 634
Simmons v. London Joint Stock Bank..	[1891] 1 Ch. 270, at pp. 284, 286 .....618, 620	291, 300
Simpson v. Foxon.....	[1907] P. 54, 76 L.J.N.S.P. 7..	10
Simpson v. Westminster Palace Hotel Co.....	8 H.L.C. 712.....	10
Sinclair and Town of Owen Sound, Re..	12 O.L.R. 488, 13 O.L.R. 447, at pp. 448, 450, 451, 454..... .....70, 363, 365, 501	
Sinden v. Brown.....	17 A.R. 173, 187.....	90, 91
Skerry v. Preston.....	2 Chit. R. 245.....	314
Sklitzsky v. Cranston.....	22 O.R. 590.....	411
Slater v. Canada Central R.W. Co.....	25 Gr. 363.....	178
Slattery v. Naylor.....	13 App. Cas. 446.....	567, 571
Small v. Marwood.....	9 B. & C. 300, at p. 306.....	634
Smiler, In re, Bedford v. Hughes.....	[1903] 1 Ch. 198.....	273
Smith v. Baker.....	L.R. 8 C.P. 350, 357.....	486
Smith v. Buckingham.....	21 L.T.N.S. 819.....	170
Smith v. Canada Car Co., In re.....	6 P.R. 107.....	156, 159, 160
Smith v. Carey.....	5 O.L.R. 203, at p. 208.....	532
Smith v. City of London.....	20 O.L.R. 133.....	505, 506, 507, 508
Smith v. City of Vancouver.....	5 B.C.R. 491.....	232
Smith v. Evans.....	13 C.P. 60, at p. 62.....	589
Smith v. Jobson.....	59 L.T.R. 397.....	271
Smith v. Wheeler.....	1 Vent. 128.....	634
Soames v. Edge.....	Johnson's Rep. 669.....	480
Society of Practical Knowledge v. Abbott.....	2 Beav. 559.....	132
Solicitor, Re.....	14 O.L.R. 464.....	257
Soper v. Arnold.....	14 App. Cas. 429.....	647
Spiers v. Hunt.....	[1908] 1 K.B. 720.....	631
Sprague v. Booth.....	[1909] A.C. 576.....	658
Stackpoole v. Stackpoole.....	4 Dr. & War. 320, 347.....	409
Stanbury v. Exeter Corporation.....	[1905] 2 K.B. 838, at pp. 841, 843.	563
Standing v. Bowring.....	31 Ch.D. 282.....	630, 633, 634
Staniland v. Hopkins.....	9 M. & W. 178.....	532
State v. Freeman.....	38 N.H. 426.....	567
Steel v. Prickett.....	2 Stark. 463.....	136
Stevens v. Woodward.....	6 Q.B.D. 318.....	557, 558, 560
Still v. Hastings.....	13 O.L.R. 322, 324.....	585, 593
Stooke v. Taylor.....	5 Q.B.D. 569.....	462
Stratford Gas Co. v. Gordon.....	14 P.R. 407.....	168
Sullivan v. Waters.....	14 Ir. C.L.R. 460.....	137
Sussex Peerage, The.....	11 Cl. & F. 85, at p. 114.....	218
Sutherland, Duke of, v. Heathcote.....	[1892] 1 Ch. 475, 483.....	473

## T.

Talbot v. Cody.....	10 Ir. R. Eq. 138.....	112, 117
Tatam v. Hasler.....	23 Q.B.D. 345.....	254
Taylor v. Hare.....	1 B. & P.N.R. 260.....	170
Taylor v. Manchester Sheffield and Lin- colnshire R.W. Co.....	[1895] 1 Q.B. 134, at p. 140..	420, 447
Taylor v. Mosely.....	6 C. & P. 273.....	341



NAME OF CASE.	WHERE REPORTED.	PAGE
Taylor v. Scott.....	30 O.R. 475.....329, 351, 358,	359
Tempest v. Kilner.....	3 C.B. 249.....	618
Thames Conservators v. Smeed.....	[1897] 2 Q.B. 334, at p. 351.....	356
Theatrical Trust Limited, In re.....	[1895] 1 Ch. 771.....	383
Third National Bank of Buffalo v. Buffalo German Insurance Co.....	193 U.S. 581.....	156
Thompson v. Big Cities Realty and Agency Co.....	21 O.L.R. 394.....	459
Thompson v. First National Bank of Toledo.....	111 U.S. 529.....	516
Thompson v. Planet Benefit Building Society.....	L.R. 15 Eq. 333.....	306
Tindley v. City of Salem.....	137 Mass. 171.....	563
Tinsley v. Toronto R.W. Co.....	17 O.L.R. 74.....	422
Toker v. Toker.....	31 Beav. 629.....	630
Toronto, City of, v. Virgo.....	[1896] A.C. 88, at p. 93.....	
	.....158, 506, 566, 567, 571,	573
Toronto Corporation v. Toronto R.W. Co.....	[1907] A.C. 315.....	21
Toronto R.W. Co. v. Gosnell.....	24 S.C.R. 582, at pp. 583, 587...	422
Toronto R.W. Co. v. King.....	[1908] A.C. 260.....	453
Townsend v. Moore.....	[1905] P. 66.....	293
Travis v. Travis.....	12 A.R. 438.....	115, 630
Treacey v. Liggett.....	20 Rev. Leg. O.S. 131 n.....	219
Treleven v. Bray.....	1 Ch.D. 176.....	400
Trevor v. Whitworth.....	12 App. Cas. 409, 417, 419, 428..	251
Trough's Estate.....	75 Pa. St. 114.....	627
Trowel v. Castle.....	1 Keb. pl. 62, at p. 22.....	341
Tucker v. Collinson.....	34 W.R. 354, 16 Q.B.D. 562.....	401
Tuckey v. Henderson.....	33 Beav. 174.....	301
Turgeon v. Shannon.....	Q.R. 20 S.C. 135.....	209, 210, 219
Turner v. Hednesford Gas Co.....	3 Ex. D. 145.....	400
U.		
Ulrich, In re.....	14 Phila. 243.....	286
Upton v. Hutchison.....	Q.R. 8 Q.B. 505, 508.....	155
Upton v. Townend.....	17 C.B. 30, at p. 64.....	261
V.		
Valiquette v. Fraser.....	39 S.C.R. 1.....	547, 554
Vermilyea v. Canniff.....	12 O.R. 164.....	171, 177
Viger v. Kent.....	16 Rev. Leg. O.S. 565.....	214, 219
Virgo and City of Toronto, In re.....	20 A.R. 435.....	506
W.		
Wade v. Kendrick.....	37 S.C.R. 32.....	435
Waikato, Owners of Cargo on Board S.S., v. New Zealand Shipping Co..	[1898] 1 Q.B. 645, 647, [1899] 1 Q.B. 56.....	183
Waldron v. Town of Westmount.....	Q.R. 8 S.C. 324.....	570
Walker v. South Eastern R.W. Co....	L.R. 5 C.P. 640.....	590
Walker, In re.....	[1897] 2 Ch. 238, 242.....	268
Walkerton, Town of, v. Erdman.....	23 S.C.R. 352.....	323
Wallace v. McLaughlin.....	57 Ill. 53.....	647
Walton v. Lavater.....	8 C.B.N.S. 162.....	176
Ward v. Bradley.....	1 O.L.R. 118.....	630
Washington and Georgetown R.R. Co. v. Grant.....	11 Tucker (Dist. of Col. App.) 107.....	609
Watkins v. Great Northern R.W. Co....	16 Q.B. 961.....	356
Watson v. England.....	14 Sim. 28.....	286
Watson v. Hawkins.....	24 W.R. 884.....	178, 403

NAME OF CASE.	WHERE REPORTED.	PAGE
Watson v. McAllum.....	87 L.T.R. 547.....	491
Watson, Ex p.....	21 Q.B.D. 301, 309.....	311
Watt v. Clark.....	18 O.R. 602.....	589
Weatherbe v. Whitney.....	30 N.S.R. 49.....	129
Weaver v. Weaver.....	182 Ill. 287.....	627
Webb v. Hamilton.....	10 O.W.R. 192.....	394
Webb v. Hughes.....	L.R. 10 Eq. 281.....	647
Webb v. Ross.....	4 H. & N. 111.....	338
Weir v. Bell.....	3 Ex. D. 238, 243.....	311
Welfare v. London and Brighton R.W. Co.....	L.R. 4 Q.B. 693.....	548
Weller v. McCormick.....	47 N.J. Law 397, at p. 398.....	142
Welton v. Saffery.....	[1897] A.C. 299.....	380
Wenlock v. River Dee Co.....	36 Ch.D. 674.....	10, 21, 24
West v. Bristol Tramways Co.....	[1908] 2 K.B. 14.....	548
West v. West.....	17 L.R. Ir. 49.....	151
Weston, In re.....	[1902] 1 Ch. 680.....	115
West Toronto Election Petition.....	5 P.R. 394.....	532
Weymouth and Channel Islands Steam Packet Co., In re.....	[1891] 1 Ch. 66.....	380, 381
Wheatecroft v. Hickman.....	9 C.B.N.S. 47, 85.....	512
Wheelhouse v. Darch.....	28 C.P. 269.....	548
Whitcombe, In re.....	8 Beav. 140.....	258
White v. Boby.....	26 W.R. 133.....	657
White v. Jameson.....	L.R. 18 Eq. 303.....	548, 555
Whitehouse, In re.....	37 Ch.D. 683, at p. 693.....	118
Whiting v. Tuttle.....	17 Gr. 454.....	176
Whitman v. Western Counties R.W. Co.....	17 N.S.R. 405, 409.....	183
Whittier v. McLennan.....	13 U.C.R. 638.....	646
Whitty, Re.....	30 O.R. 300.....	466
Whitworth v. Smith.....	5 C. & P. 250.....	521
Wickham v. Hawker.....	7 M. & W. 63, 78.....	473
Wiggins v. Semi-Ready Clothing Co.....	23 C.L.T. Occ. N. 117.....	137
Wilbraham v. Scarisbrick.....	1 H.L.C. 167.....	299
Williams v. Clough.....	1 A. & E. 376.....	339
Williams v. Peel River Land and Mineral Co.....	55 L.T.N.S. 689.....	620
Williams v. Protheroe.....	5 Bing. 309, at p. 314.....	557
Williams v. Reynolds.....	6 B. & S. 495.....	618
Wilson v. Carnley.....	[1908] 1 K.B. 729.....	631
Wilson v. Church.....	13 Ch.D. 1, at p. 51.....	311
Wilson v. Union Oil Mills Co.....	9 R.P.C. 57.....	169, 174
Wilton v. Brignell.....	[1875] W.N. 239.....	243
Winkfield, The.....	[1902] P. 42, at p. 60.....	417
Winn v. Bull.....	7 Ch.D. 29.....	486, 490, 491, 494
Winter v. Winter.....	4 L.T.N.S. 639.....	630
Withers v. Reynolds.....	2 B. & Ad. 882.....	315
Wood, In re.....	[1902] 2 Ch. 542.....	274
Woodruff, In re.....	16 O.L.R. 348.....	40
Woodward v. Sarsons.....	L.R. 10 C.P. 733, at p. 746 <i>et seq.</i> .....	532
Woolsey v. Canadian Northern R.W.Co.....	11 O.W.R. 1030, 1036.....	446, 451
Wortham v. Pemberton.....	9 Jur. 291.....	147
Worts v. Cubitt.....	19 Beav. 421.....	267
Wragg Limited, In re.....	[1897] 1 Ch. 796.....	383, 393
Wrexham Mold and Connah's Quay R.W. Co., In re.....	[1899] 1 Ch. 440.....	21

## Y.

Yates v. Dalton.....	28 L.J.N.S. Ex. 69.....	511
Yates v. Whyte.....	4 Bing. N.C. 272, at p. 284.....	557
Young v. Corporation of Leamington.....	8 Q.B.D. 579, 8 App. Cas. 517.....	46, 48
Young and Township of Binbrook, Re.....	31 O.R. 108.....	54, 70, 363
Young, In re.....	28 Ch.D. 705.....	117

## Z.

Zimbler v. Abrahams.....	[1903] 1 K.B. 577.....	491
--------------------------	------------------------	-----



# REPORTS OF CASES

DETERMINED IN THE

## COURT OF APPEAL

AND IN THE

### HIGH COURT OF JUSTICE FOR ONTARIO.

[IN THE COURT OF APPEAL.]

RE ONTARIO BANK.

BANK OF MONTREAL'S CLAIM.

*Banks and Banking—Contract between Banks—Advances—Pledge or Sale of Assets—Bank Act, secs. 99-111—Construction and Validity of Contract—Powers of Directors—Interpretation Act, sec. 30—Bank Act, sec. 76—Winding-up of Bank—Proof of Claim.*

C A

1909

Oct. 14.

Oct. 27.

1910

April 18.

By an agreement made between the Ontario Bank and the Bank of Montreal on the 13th October, 1906, it was recited that, owing to recently discovered misconduct of an officer of the Ontario Bank, the directors of that bank deemed it necessary and expedient to make immediate provision for payment or taking up of its debts and liabilities, and had applied to the Bank of Montreal for that purpose, and had exhibited to the Bank of Montreal a statement of its assets and liabilities as of the 29th September, 1906, as summarised in the recital, and that the Ontario Bank had since continued to carry on its business in the ordinary course. The agreement then provided (clause 1) that the Ontario Bank warranted the assets and liabilities to be as set out; (clause 2), that, "in consideration of the premises, the Bank of Montreal hereby agrees to purchase by way of discount and of re-discount at the rate of six per cent. all the call and current loans and overdue debts of the Ontario Bank," etc. This clause and clauses 3 to 8 provided for advances to be made by the Bank of Montreal and the security it was to receive therefor. By clause 9, the Ontario Bank "agrees that it will not carry on business except for the purpose of selling and realising on its assets and of otherwise providing and by means of the shareholders' double liability furnishing the moneys necessary for the payment as herein provided of its notes in circulation, debts, liabilities, and obligations, including therein all advances and interest and other obligations that may be owing or due to the Bank of Montreal under the provisions hereof or otherwise." Clauses 10 to 14 provided the machinery by which the arrangement between the two banks was to be worked out. Clause 15 bound the Bank of Montreal to account to the Ontario Bank for any surplus realised from the securities transferred to it under the agreement. And clause 16 provided for the payment by the Bank of Montreal to the Ontario Bank of \$150,000 for any indirect benefit derived by the Bank of Montreal under the agreement.

An order having been made on the 29th September, 1908, for the winding-up of the Ontario Bank under the Dominion Winding-up Act, the Bank of Montreal presented a claim as a creditor, and the question then arose whether the above agreement was valid and binding in whole or in part upon the Ontario Bank and its shareholders, so as to form a sufficient basis for taking an account of what was due to the Bank of Montreal:—

C. A.  
1909  
—  
RE  
ONTARIO  
BANK.

*Held*, that the transaction was not a sale of the assets of the Ontario Bank within the provisions of secs. 99 to 111 of the Bank Act; that it was an arrangement which was within the powers of the board of directors to enter into; that it was binding; and that the Bank of Montreal was entitled to make proof of its claim against the estate of the Ontario Bank upon the footing of it.

*Bank of Australasia v. Breillat* (1847), 6 Moo. P.C. 152, specially referred to. *Per Moss, C.J.O.*:—A fair reading of the whole instrument, giving to each part its proper effect in relation to the remainder, and bearing in mind the evident object and intention of the parties, leaves no reasonable doubt as to its meaning and effect. The strongest ground in favour of the contention that the transaction was a sale was the use in clause 2 of the expression "purchase by way of discount and of rediscount at the rate of six per cent." But these words merely describe a species of dealing with a particular class of securities which is quite as consistent with a pledge as an absolute sale.

*Per MACLAREN, J.A.*:—The banks had the right to make the agreement under the law as it stood in 1900, before the Bank Amendment Act of that year (now secs. 99 to 111 of the Bank Act, R.S.C. 1906, ch. 29), the powers conferred by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 30, and by sec. 76 of the Bank Act, being wide enough to include the transaction in question; and the amendment of 1900 did not take away the previous powers of the directors by requiring such an agreement to be carried out exclusively under the provisions and subject to the formalities of secs. 99 to 111.

Decisions of BRITTON, J., and an Official Referee, affirmed.

By an order made by a Judge of the High Court, in Chambers, on the 29th September, 1908, upon a petition by the Bank of Montreal and another, creditors of the Ontario Bank, it was declared that the Ontario Bank was an incorporated bank and was insolvent, within the meaning of the Dominion Winding-up Act and amendments thereto, and it was ordered that the business of the bank and the bank should be wound up under the provisions of the Act and amendments. By another order of the same date the Royal Trust Company were appointed liquidators, and a reference was directed to George Kappele, K.C., an Official Referee, to take all such proceedings as might be necessary for the winding-up of the bank.

The Bank of Montreal having filed with the liquidators certain claims to rank as creditors of the Ontario Bank, and an order having been made by the Referee on the 4th November, 1908, directing the liquidators to admit the claims, one W. J. McFarland, a person named in the list of alleged contributories, moved before the Referee for an order directing the liquidators to contest and dispute the claims of the Bank of Montreal, and not to admit the same, and to set aside the order of the 4th November, 1908.

This motion was dismissed by the Referee on the 13th May, 1909.

W. J. McFarland appealed from the order of the Referee, and



upon that appeal and the application of the liquidators for directions as to the contestation of the claims of the Bank of Montreal, BOYD, C., on the 9th June, 1909, made an order referring the matter back to the Referee to take the account of what was due to the Bank of Montreal from the Ontario Bank, without regard to the order of the 4th November, 1908, or any action thereunder, and directing that the liquidators, "as counsel for the said contributory (McFarland) may advise, and with the assistance of the said contributory, shall surcharge and falsify the said accounts and dispute the same."

Upon the reference back, the Bank of Montreal having filed an account, the sufficiency of which was disputed by McFarland, the Referee on the 2nd October, 1909, intimated that before ruling upon this question or otherwise proceeding with the reference, he should first proceed to determine the issue "whether or not the alleged agreement dated the 13th October, 1906, between the Ontario Bank and the Bank of Montreal is valid and binding, in whole or in part, upon the Ontario Bank and its shareholders."

Counsel for all parties then agreed, as the Referee certified, as follows:—

"1. That the above issue may be tried by me (not as *persona designata* or arbitrator) upon this reference and subject to appeal in the usual way, and as though a writ had been issued and the above issue had been tried in an action.

"2. That the evidence and proceedings had and taken herein upon (a) the application to settle the list of contributories herein, (b) the application of the liquidators for directions as to the Bank of Montreal's claim, (c) the application of the shareholder for a direction to the liquidators to contest the Bank of Montreal's claim and for other relief, may be used upon the trial of the above issue in the same manner as if they had been had and taken upon the trial thereof, and that the notes of such evidence and proceedings be filed as part of the record herein, but either party shall be at liberty to adduce such other evidence as he or it may be advised.

"3. That, if the said agreement is ultimately by any final judgment held to be valid and binding so as to form a sufficient basis for taking the said account, the shareholder will not demand the filing by the Bank of Montreal of any accounts in addition

C. A.  
1909  
RE  
ONTARIO  
BANK.

C. A.  
1909

RE  
ONTARIO  
BANK.

to those already filed, and the same shall stand, subject only to such errors and omissions, if any, as may be found therein."

The following was the agreement the validity of which was in question:—

"This agreement made the 13th day of October, 1906, between the Ontario Bank, of the first part, and the Bank of Montreal, of the second part.

"Whereas, owing to recently discovered misconduct of one of the officers of the Ontario Bank, the directors of the Ontario Bank deem it necessary and expedient to make immediate provision for payment or taking up of its debts and liabilities, and have applied to the Bank of Montreal for that purpose, and have exhibited to the Bank of Montreal a statement of assets and liabilities, whereby it appears that, as of the 29th of September, 1906, the Ontario Bank possessed, amongst other properties and assets, the following properties and assets, to the amount hereinafter mentioned against each item thereof:—

Specie.....	\$ 105,003.60
Dominion notes.....	268,545.50
Notes of and cheques on other banks.....	546,382.02
Deposits to secure circulation.....	70,000.00
Deposits made with and balances due by other banks in Canada.....	600,486.01
Balances due from agencies of the bank or from other banks or agencies elsewhere than in Canada	48,285.33
Dominion and provincial Government securities....	20,683.33
Other assets.....	529,537.89
Canadian municipal securities and British or Foreign or Colonial public securities other than Canadian	242,317.48
Railway and other bonds and debentures and stocks	917,503.18
Call and current loans in Canada and elsewhere...	12,877,093.36
Overdue debts.....	23,242.76
<hr/>	
Making a total of.....	\$16,249,080.46

"And also that on the said 29th day of September, 1906, its debts and liabilities were as follows:—



Notes in circulation.....	\$ 1,351,402.00	C. A.
Other debts and liabilities.....	13,920,869.22	1909
		RE
Making a total of debts and liabilities of...	\$15,272,271.22	ONTARIO BANK.

“And whereas the Ontario Bank has since continued to carry on its business in the ordinary course:—

“Now it is agreed between the parties hereto as follows:—

“1. The Ontario Bank hereby warrants and undertakes that the respective properties and assets above mentioned were, on the day above mentioned, respectively of the nature and character above mentioned, and they were respectively of the aggregate amount and value set opposite to each of the same, respectively; and that the notes in circulation did not then exceed the sum of \$1,351,402, and that the other debts and liabilities did not then exceed the sum of \$13,920,869.22.

“2. In consideration of the premises, the Bank of Montreal hereby agrees to purchase by way of discount and of rediscount at the rate of six per cent. all the call and current loans and overdue debts of the Ontario Bank existing at the close of business on the 12th day of October, 1906, the amount thereof to be ascertained as soon as possible, it being understood that the Bank of Montreal shall be entitled to the benefit of an immediate transfer of all and every security or securities held for all or any of such loans and overdue debts.

“3. The Ontario Bank hereby covenants that all the said call and other current loans and overdue debts so discounted or rediscounted are good and valid, and that the said call and current loans will be paid in full at the respective maturities of the same, and that the said overdue debts will be duly paid.

“4. The proceeds arising from such discount and rediscount shall be retained and applied by the Bank of Montreal from time to time in and towards the payment of the notes in circulation and other debts and liabilities of the Ontario Bank to the public.

“5. The Ontario Bank shall forthwith transfer and pay over its specie and Dominion notes, ready moneys and notes of and cheques on other banks to the Bank of Montreal, to be applied as mentioned in clause 4 hereof.

“6. The Ontario Bank shall proceed with as little delay as

C. A.  
1909  

---

RE  
ONTARIO  
BANK.

possible to sell, realise on, and convert into money, the residue of its properties and assets, for the best price reasonably procurable for the same, and shall from time to time, as received, pay over to the Bank of Montreal all moneys so received from such sale, realisation, and conversion, to be applied as mentioned in clause 4 hereof, but the Ontario Bank shall not, without the consent of W. E. Stavert, representing the Bank of Montreal, sell any of the bank buildings and premises in which the business of the Ontario Bank is being carried on, for twelve months from the date hereof, but the Bank of Montreal shall pay or account for a reasonable rent whilst it occupies said premises.

"7. It is agreed that the Bank of Montreal shall have the right to set aside out of said purchase price and other moneys mentioned in the 4th, 5th, and 6th clauses hereof, a sufficient sum of money to pay and satisfy the notes in circulation, and the debts of the Ontario Bank owing to the Government of the Dominion or the Governments of the Provinces, and may apply the same specially to such purposes.

"8. If, after applying all the said purchase money, specie, and Dominion notes, ready moneys and notes of and cheques on other banks, in and towards payment or satisfaction of said notes in circulation, debts, and liabilities of the Ontario Bank to the public, any of the said notes in circulation, debts, and liabilities shall still remain unpaid and unsatisfied, and there shall not be funds from time to time in the hands of the Bank of Montreal, furnished by the Ontario Bank, sufficient to pay, satisfy, or otherwise discharge said unpaid notes in circulation, debts, and liabilities, then the Bank of Montreal hereby agrees to advance the sums from time to time necessary for the payment or satisfaction of the said notes in circulation, debts, and liabilities to the public, the Ontario Bank hereby agreeing to repay on demand to the Bank of Montreal the sums so advanced by it from time to time, with interest at the rate of six per centum per annum.

"9. The Ontario Bank hereby agrees that it will not carry on business except for the purpose of selling and realising on its assets and of otherwise providing and by means of the shareholders' double liability furnishing the moneys necessary for the payment as herein provided of its notes in circulation, debts, liabilities, and obligations, including therein all advances and

interest and other obligations that may be owing or due to the Bank of Montreal under the provisions hereof or otherwise.

"10. The Ontario Bank hereby agrees, whenever required by the Bank of Montreal, to take or concur in all necessary proceedings (including winding-up proceedings if necessary) for the carrying out of this agreement.

"11. The Ontario Bank shall forthwith place the Bank of Montreal and its agents, officers, and servants in possession and control of all the offices, branches, and agencies of the Ontario Bank for the purpose of enabling the Bank of Montreal more effectually to carry out the provisions of this agreement, and the Ontario Bank hereby agrees that the Bank of Montreal may constitute any officer or officers of the Ontario Bank the agent, servant, or officer of the Bank of Montreal, for the purpose of taking over the properties, assets, and premises purchased as aforesaid and of paying the debts, liabilities, and obligations of the Ontario Bank as aforesaid, and otherwise for the purposes of this agreement.

"12. In respect of the call and other current loans and the overdue debts purchased by the Bank of Montreal as mentioned in clause 3 hereof, it is agreed that the said Bank of Montreal, without exonerating in whole or in part the Ontario Bank from its covenant and warranty that the same shall be paid in full as herein provided, may grant renewals, re-renewals, extensions, indulgences, releases, and discharges, take securities from and give the same up to, accept compositions from, and otherwise deal with, the persons liable to pay such loans and debts, and all other persons and securities as the said Bank of Montreal may see fit, taking such renewals and re-renewals in its own name if it sees fit, and that every certificate issued under the seal of the Bank of Montreal purporting to shew the amount at any particular time due and payable by the Ontario Bank under the 3rd clause hereof, shall be received as *prima facie* evidence as against the Ontario Bank that such amount is at such time so due and payable to the said Bank of Montreal and is covered hereby.

"13. The Ontario Bank and the Bank of Montreal shall each appoint one bank officer to form an advisory committee to settle and adjust all questions of account which shall or may arise between the said banks in working out this agreement, and who shall

C. A.  
1909  
—  
RE  
ONTARIO  
BANK.

C. A.  
1909  
RE  
ONTARIO  
BANK.

fix the rents from time to time payable by the Bank of Montreal to the Ontario Bank for the use and occupation of banking premises, and the decision of such advisory committee on all such questions, if unanimous, shall be final, and in case of differences between them, the same shall from time to time as they arise be referred to H. C. Hammond, whose decision shall be final, or, in case of his death or refusal or inability to act, shall from time to time be referred to such person or persons as may, on application of either party, be appointed for that purpose by the person for the time being occupying the position of Chief Justice of the Court of Appeal for the Province of Ontario.

"14. And the Ontario Bank doth hereby covenant and agree with the Bank of Montreal, its successors and assigns, that it, the Ontario Bank, shall and will from time to time, and at all times hereafter, whenever requested by the Bank of Montreal, make, execute, and do, or cause to be made, executed, or done, all such further and other lawful acts, deeds, things, assignments, conveyances, and assurances in the law whatsoever as the Bank of Montreal may deem requisite for the better more perfectly and absolutely assigning, transferring, and securing the said property, assets, and premises as aforesaid, and every part thereof, unto the Bank of Montreal so as to vest the said property, assets, and premises in the said Bank of Montreal, as herein provided, and to enable it to carry out this agreement. And the Ontario Bank hereby irrevocably appoints the Bank of Montreal the attorney of the Ontario Bank, and, in the name and on behalf of the Ontario Bank, to do and execute all such acts, deeds, things, conveyances, assignments, and assurances which the Ontario Bank ought to execute and do under the foregoing covenant for further assurance.

"15. If there shall be any surplus moneys in the hands of the Bank of Montreal belonging to the Ontario Bank, after payment of all the said notes in circulation, debts, liabilities, and obligations and after the due carrying out of the premises, the Bank of Montreal shall pay the same over to the Ontario Bank.

"16. If the terms and conditions of this agreement are capable of being and are in fact carried out by the Ontario Bank as and in the manner herein contemplated and agreed, then, for the indirect benefit thereby accruing to the Bank of Montreal, it agrees



to pay to the Ontario Bank or to allow and credit on the final adjustment of accounts the sum of \$150,000."

October 14, 1909. The Official Referee, having heard the evidence and arguments of counsel, gave judgment upon the issue as to the validity of the above agreement.

He set out the agreement as above, and made a detailed statement of the evidence as to the circumstances in which it was entered into and other facts in evidence, and continued:—

No action was ever taken by any of the shareholders attacking the agreement in question or the position of the Bank of Montreal under it, and the order for winding-up was made at the instance of the Bank of Montreal. The position now taken by the shareholders, that the agreement in question was invalid, was first taken when the matter came before me as the delegated Referee under sec. 110 of the Winding-up Act, to settle the list of contributories, the contention being then made that the Bank of Montreal had no valid claim under the terms of the agreement, and, there being no other creditors of the bank, no list of contributories for the purpose of liability should be settled, as there would be a surplus of assets divisible amongst the shareholders of the bank.

The transaction in question between the two banks, as evidenced by the agreement in question, was not put through as provided by secs. 99 to 111 of the Bank Act, under the heading, "The purchase of the Assets of a Bank," and the formalities required under those sections to make the agreement valid and binding under them were not complied with.

Messrs. I. F. Hellmuth, K.C., John A. Paterson, K.C., and Glyn Osler, counsel for the shareholder attacking the claim of the Bank of Montreal, contended that the transaction, as evidenced by the agreement, was within the meaning of the sections of the Bank Act immediately above referred to, and, the requirements of those sections not having been complied with, the agreement never had any force or effect, under the express provision of sec. 102 of the Bank Act. They also contended that, if the agreement was not within those sections, that is, was not to be treated as a purchase of the assets of the bank within the meaning of those sections, then it was in effect an agreement providing for the voluntary liquidation of the Ontario Bank by the Bank of Montreal, and was *ultra vires*.

C. A.

1909

RE  
ONTARIO  
BANK.

Official Referee.

C. A.  
1909  
RE  
ONTARIO  
BANK.  
Official Referee.

For the last proposition the following cases were cited: *Ernest v. Nicholls* (1857), 6 H.L.C. 401; *Simpson v. Westminster Palace Hotel Co.* (1860), 8 H.L.C. 712; *Ritchie v. Vermillion Mining Co.* (1902), 1 O.W.R. 624; *In re Bank of South Australia*, [1895] 1 Ch. 578; *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653; *Wenlock v. River Dee Co.* (1887), 36 Ch. D. 674; *Attorney-General v. London City Council*, [1901] 1 Ch. 781, at p. 797; *Attorney-General v. Great Eastern R.W. Co.* (1880), 5 App. Cas. 473, 486.

Messrs. James Bicknell, K.C., and G. B. Strathy appeared as counsel for the liquidators, and, under the order of the learned Chancellor, supported counsel for the attacking shareholder.

Messrs. Wallace Nesbitt, K.C., and J. A. Worrell, K.C., appeared for the Bank of Montreal, and contended that the agreement in question was a scheme of borrowing between the two banks, by which the directors of the Ontario Bank, on the eve of its crisis, arranged with the Bank of Montreal to pay its immediately pressing liabilities as recited in the agreement, and relied upon the judgment of the Privy Council in the case of *Bank of Australasia v. Breillat* (1847), 6 Moo. P.C. 152, as establishing that such a transaction as is evidenced by the agreement in question is well within the powers of the directors of a bank.

I have come to the conclusion that the agreement in question was not a purchase by the Bank of Montreal of the assets of the Ontario Bank, within the meaning of secs. 99 to 111 of the Bank Act.

The agreement shortly recites the assets and liabilities, and that the Ontario Bank has since continued to carry on its business in the ordinary course.

Clause 1 is a warranty as to the truth of the recitals. Clauses 2, 3, 4, 5, 6, 7, and 8 provide for the advances to be made by the Bank of Montreal and the security it is to receive therefor. Clauses 10, 11, 12, 13, and 14 provide the machinery by which the arrangement between the two banks is to be worked out. Clause 15 binds the Bank of Montreal to account to the Ontario Bank for any surplus realised from the securities transferred to it under the agreement. Clause 16 provides for the payment by the Bank of Montreal to the Ontario Bank, for any indirect benefit derived by the Bank of Montreal under the agreement, of the sum of \$150,000.

Clause 9 is especially attacked by counsel for the shareholders as being *ultra vires*. This clause is not a necessary clause, and does not affect the legality of the other clauses under which the claim of the Bank of Montreal arises.

As to enforcing the double liability of the shareholders, this would be the legal right of the Bank of Montreal in any event as a creditor, and is not in any way dependent upon any agreement between the two banks. After suspension, the directors are bound, under the Bank Act, to make calls upon the shareholders to the amount they deem necessary to pay all the debts and liabilities of the bank: secs. 128 and 154. The proviso in the same clause that the Ontario Bank will not carry on business, except for the purpose of selling and realising on its assets, is the necessary result of the whole transaction, as well as of the bank's financial position, and is also not dependent upon any agreement between the two banks.

A provision similar to this in the case of *Bank of Australasia v. Breillat*, 6 Moo. P.C. 152, is dealt with in the judgment given by the Right Hon. T. Pemberton Leigh, at p. 197, in the following language: "But it by no means follows, that the directors had no authority at their discretion to discontinue the business of the bank, or to restrict it to certain portions of the business originally contemplated, if they thought such conduct essential to the interests of the shareholders. Such a power seems necessarily implied in the exclusive power of management, in the power of determining what transactions should be entered into, what notes issued, what deposits received, what bills discounted, or loans made. A contrary construction would be attended with the most serious consequences. . . . We think, therefore, that the discontinuance of the business of the bank, if the directors thought it necessary or expedient, was within their authority; and that they had authority to borrow money for the purpose of discharging the existing engagements, and prolonging the business till the assets could be realised, and the concern wound up with the least injury to the company. . . . The appellants had a right to annex such terms as they thought proper to their advance. If any of those terms were *ultra vires* of the directors, they could not be enforced, and so far the lenders might lose the advantage for which they had stipulated. The corporation stood in no relation

C. A.

1909

RE

ONTARIO  
BANK.

Official Referee.



C. A.  
1909  
—  
RE  
ONTARIO  
BANK.  
—  
Official Referee.

of trust or confidence to the shareholders of the company. It had a right to make the best bargain which it could; and the only question is, was the purpose for which the money was lent, a legitimate purpose of the partnership? It appears to us, that the purpose for which the money was borrowed, was not to increase the permanent capital of the company, not to enable the directors to engage it in new concerns beyond the provisions of the deed, and contract new liabilities, but to enable it to discharge liabilities already contracted, and to afford it time for the realisation of its assets."

The only clause in the agreement in question that speaks of purchase is clause 2, but, read with the other clauses, it is clearly not a purchase, but only a way of stating the transaction for the convenience of banking methods and book-keeping purposes. The words are: "To purchase by way of discount and of rediscount." This simply means that the title to the call and current loans and overdue debts passed with their attendant securities to the Bank of Montreal, but with the liability of the Ontario Bank, for whom the discount was made, and, under the other clauses of the agreement, the Bank of Montreal must account for any surplus, and the Ontario Bank must make good any deficiency.

The sections of the Bank Act under the heading "The Purchase of the Assets of a Bank" do not in any way interfere with the necessary and inherent powers of the directors of a bank, either under the Bank Act or the general principles of law well established as to the powers of directors or managers in banking partnerships or corporations, to borrow for all necessary purposes and emergencies to pay their lawful debts. The sections in question do not pretend to deal with the rights of the creditors of a bank; they have in mind only the shareholders' rights, and the amalgamation of banks. The shareholders' rights are essentially subservient to the rights of creditors. For example, the Ontario Bank owed to its depositors over twelve millions of dollars; a demand for this amount by the depositors could only be met by either a sale or a borrowing by the directors, and this demand could not be resisted by the directors taking time to call a meeting of the shareholders or to do the acts required by the sections referred to. When the creditors of a bank decide to make a demand, that demand is usually immediate, and, as the whole business of a

bank is one of borrowing and lending, as the directors may decide, and in whom this power of management is absolutely vested, they must have the power to meet a crisis or emergency such as arose in this case by dealing with the assets under their control, as they in their discretion think best, for the purpose of meeting their lawful debts. I think that the directors not only had the power to do what they did, but, under the provisions of the Bank Act itself, it was their duty to do just what they did, and that, under all the circumstances, they were very fortunate in having the Bank of Montreal meet their views and agree to enter into the arrangement that was made.

The interest of the shareholders in this bank was a small factor in its operations. A reference to the statement of assets and liabilities already quoted shews that the capital was \$1,500,000. Of this, amongst the assets under the heading of "Officers' Guarantee Fund," shares of the bank to the amount of \$221,479.34 were illegally purchased by the bank and held by it, leaving the net actual capital of the bank, \$1,278,520.66. The rest appears at \$700,000, making the total interest of shareholders in the bank, \$1,978,520.66, but the same statement shews that on the 29th September, 1906, there was a deficiency of assets over liabilities of \$1,474,219.11, leaving the actual interest of the shareholders of the bank at the sum of \$504,301.55, while the bank owed to its depositors and others, excluding shareholders, over \$15,000,000.

When it is once conceded that the bank had reached a crisis in its affairs and could not meet its immediate obligations—and that fact is undeniable—everything else follows therefrom. How would the directors of this bank ever have dared to meet their twelve million dollars of depositors if they had declined the arrangement in question? Immediate action was necessary to save and protect the rights of the depositors, who had the first claim upon the assets of the bank and the protection of the directors, and whose rights were paramount over those of the shareholders.

This leads up to the question, what would have happened, under the Bank Act and in law, if the directors had not acted as they did? The bank, as the evidence shews, would have had to have closed its doors on the morning of the 13th October, to its creditors, not to its shareholders, not to its debtors, and the twelve million dollars of depositors would have had to wait until the

C. A

1909

RE

ONTARIO  
BANK.

Official Referee.

C. A.

1909

RE

ONTARIO  
BANK.

Official Referee.

almost endless and expensive machinery of winding-up would have enabled a liquidator to realise upon the assets and pay them dividends from time to time. Instead of this situation, the directors were, by what one may call a lucky chance, able to have a strong, solvent banking institution like the Bank of Montreal, step into the breach, assume their position to their depositors, protect these depositors from loss, and save them from all the anxiety, delay, and expense of winding-up.

The evidence shews that the Bank of Montreal realised on all the assets of the bank which passed into its hands through its own machinery without any charge for services other than the rate of interest charged under the agreement, and, in addition to this, allowed the bank the sum of \$150,000 as a bonus.

The Bank Act itself, in case a bank is unable to meet its liabilities, contemplates immediate realisation by the directors. No provision is made for consultation with or approval of shareholders. The immediate rights of the bank's creditors preclude this. A bank suspends payment, and, if it is not put into liquidation under the Winding-up Act, the directors are bound to liquidate and realise.

The following sections shew the duties of the directors in case of the suspension of the bank: 65, 67, 116, 121, 127, 128, and 154. Under these sections, the suspension of a bank means its liquidation by its directors, with the supervision of a curator and the Canadian Bankers' Association, unless proceedings are taken outside of the Bank Act for the winding-up of the bank.

Lindley's Law of Companies, 6th ed., p. 289, states the borrowing power of a bank as follows: "A power to borrow is so necessary to a banking company that its directors can scarcely be deprived of it; and there are several cases in the books in which their power was held to have been exercised so as to bind the company;" and cites in support of this statement of the law the following authorities: *Bank of Australasia v. Breillat*, 6 Moo. P.C. 152, 12 Jur. 189; *MacLae v. Sutherland* (1854), 3 E. & B. 1; *Royal British Bank v. Turquand* (1855-6), 5 E. & B. 248, 6 E. & B. 327; *Galloway's Case* (1854), 18 Jur. 885.

The case of *Bank of Australasia v. Breillat*, 6 Moo. P.C. 152, is relied upon by Mr. Nesbitt as establishing the law as to the powers of the directors of a bank, and in support of the powers of the

directors of the Ontario Bank to enter into the agreement in question, and is, I think, very much in point. In this case the Bank of Australia, a joint stock banking company, governed by directors, elected by its members, and deriving its power by a deed of settlement, entered into an agreement very similar to the one in question in this action, and under similar circumstances, and the powers of the directors under the deed of settlement are very much the same as the powers of the directors of the Ontario Bank under the Bank Act. The powers of the directors of the Bank of Australia under its deed of settlement were as follows: "C. 51. That such board of directors should have, and they were thereby expressly invested with, full power and authority to superintend, order, conduct, regulate, and manage, all and singular the affairs and business of the said company, to the best of their discretion and judgment, under and subject to the provisions thereafter contained." "C. 54. That such board of directors should have the entire management and control of the lending of money on bills, notes, bonds, mortgages, and other securities, and of the purchase and sale of bullion, gold and silver, and such coins and moneys as they might consider necessary for carrying on the business of the said company, or as they should think advisable and advantageous for the general interests thereof, and should have the uncontrolled right of calling in, receiving and enforcing payment of all moneys due to the company however secured." "C. 55. That such board of directors should, from time to time, settle and determine in whose name or names all securities that should be required to be entered into, by and on behalf of the said company, or by or on behalf of any person or persons transacting or negotiating any matter or business whatsoever therewith, should be taken and given, and by whom and in what manner and form, and for what amount, the several cash notes of the said company should be drawn, signed, given and issued, and from time to time alter and vary the same as they should think proper."

The analogous provisions under the Bank Act are:—

"19. The stock, property, affairs and concerns of the bank shall be managed by a board of directors, who shall be elected annually in manner hereinafter provided, and shall be eligible for re-election."

"29. The directors may make by-laws and regulations, not re-

C. A.

1909

RE

ONTARIO  
BANK.

Official Referee.



C. A.

1909

RE

ONTARIO  
BANK.

Official Referee.

pugnant to the provisions of this Act or to the laws of Canada, with respect to,—

“(a) the management and disposition of the stock, property, affairs and concerns of the bank;

“(b) the duties and conduct of the officers, clerks and servants employed therein; and

“(c) all such other matters as appertain to the business of a bank.”

“76. The bank may,—

“(a) open branches, agencies and offices;

“(b) engage in and carry on business as a dealer in gold and silver coin and bullion;

“(c) deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign and other public securities; and,

“(d) engage in and carry on such business generally as appertains to the business of banking.”

A comparison between the powers conferred upon directors under the deed of settlement of the Bank of Australia and the powers conferred upon directors under the Bank Act will shew that the powers are practically the same, and, in addition to the sections of the Bank Act, schedule D. to the Bank Act, under the heading of “Liabilities,” shews clearly the nature of the liabilities that directors are empowered to incur in connection with their carrying on and management of the business of a bank intrusted to them under the Bank Act:—

#### LIABILITIES.

1. Notes in circulation .....\$
2. Balance due to Dominion Government, after deducting advances for credits, pay-lists, etc. . .
3. Balances due to provincial governments .....
4. Deposits by the public, payable on demand, in Canada .....



5. Deposits by the public, payable after notice or on a fixed day, in Canada . . . . .
6. Deposits elsewhere than in Canada . . . . .
7. Loans from other banks in Canada, secured, including bills rediscounted . . . . .
8. Deposits made by and balances due to other banks in Canada . . . . .
9. Balances due to agencies of the bank, or to other banks or agencies, in the United Kingdom . . .
10. Balances due to agencies of the bank, or to other banks or agencies, elsewhere than in Canada and the United Kingdom . . . . .
11. Liabilities not included under foregoing heads . .

C. A.

1909

RE  
ONTARIO  
BANK.

Official Referee.

There is no limitation to the loans from other banks in Canada secured, including bills rediscounted (item 7). This power is exclusive in the directors, and they can borrow according to the bank's exigencies, as they in their discretion deem necessary.

These matters are dealt with in the case of *Bank of Australasia v. Breillat*, 6 Moo. P.C. 152, at p. 194, as follows: "Then, is the nature of a banker's business such as to exclude the power, from want of occasion for its exercise? Quite the contrary. The nature of a banker's business, especially if the bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those intrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may often be impracticable, or the concern must be ruined." And again at p. 201: "Then, if the money was borrowed *bonâ fide* by the directors, for the purposes of the partnership and within the limits of their authority, and was advanced *bonâ fide* by the appellants for those purposes, and applied to the legitimate purposes of the partnership, all of which facts, for the reasons already alleged, we consider as proved; can the liability to

C. A.

1909

RE

ONTARIO  
BANK.

Official Referee.

repay the money be discharged, because to the engagement to repay, are adjected other engagements by the directors, some of which we will assume to have been *ultra vires*? From *Pigot's Case* (1615), 11 Coke's Rep. 26b, to the latest authorities, it has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal, and some illegal, at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot. Here, in our opinion, the directors had power to borrow the money for the company, and of course power to bind the company for the engagement. They did so bind them, and they engaged that the company should do, in addition, certain other acts, and which we assume that, without their consent, the company could not be compelled to do. The engagements are entirely distinct. Can the shareholders say, because we cannot be compelled to perform those engagements to which the directors had no authority to bind us, therefore, we will not perform those engagements to which they had authority to bind us? The company cannot have all the benefit for which they agreed to advance the £150,000, therefore they shall not even have their money? We think not; the only consequence would be, that those stipulations which are *ultra vires* of the directors could not be enforced; and if the object of the present action were to enforce them or to recover damages for a breach of them, it would be necessary to examine them more particularly than the view which we take of the case, requires."

The Bank Act contains no limitations to the borrowing powers of directors, the reason, no doubt, being that the very object of the incorporation is borrowing and lending. It is not an incident to the corporation, as it is in the case of trading and other corporations, but is actually the purpose of incorporation, and must be absolutely vested in the directors, who are made the managers of the property, affairs, and concerns of the bank, and to whom is given the disposition of such property and affairs (secs. 19 and 29).

The following cases cited by counsel for the attacking shareholder are distinguished in this way. Lord Blackburn in the House of Lords, with reference to a railway company, in *Attorney-General v. Great Eastern R.W. Co.*, 5 App. Cas. 473, stated the powers of a corporation in the following language: "Where there is an Act of

Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited:" p. 481. The language of Lord Selborne in *Blackburn Building Society v. Cunliffe Brooks & Co.* (1882), 22 Ch.D. 61, 70, where he says, "There is also no doubt, that where there is not an express prohibition against borrowing in the case of a company or a society constituted for special purposes, no borrowing could be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes," is approved of wherever met with in any subsequent decision.

*In re Bank of South Australia*, [1895] 1 Ch. 578, is not against the view contended for by counsel for the Bank of Montreal as to the powers of the directors of the bank in question to enter into the agreement in question. In that case, it is true that the shareholders had passed resolutions confirming what was done and providing for voluntary liquidation, but this was as required by the constitution and powers of the company, this bank being formed under the Companies Acts, 1862 to 1880, with the constitution and powers defined by its charter as modified and extended by the Companies Acts, and what was done by the shareholders was in compliance with the charter and Acts of the company. The judgment of Lord Justice Lindley in this case, at p. 590, deals with a situation very similar to the one in question. A bank that has suspended payment under the Bank Act is practically in the same position as the bank was in that case under its resolutions for voluntary winding-up. Lord Justice Lindley refers to the situation in the following language at p. 591: "They were in hopeless difficulties, and they had found another bank, the Union Bank, which would take over their assets and liabilities upon terms agreed to between them, and, in order to carry out these terms, they had resolved by a special resolution of the shareholders that liquidators should be appointed, and that the bank should be wound up, and that the liquidators should carry out the agreement with the Union Bank into which they had deliberately entered. What is there in that arrangement which is surprising, or illegal, or anything of the kind?" And again at p. 592 he says: "The other contingency is this: Suppose that the assets of the Bank of South Australia do not suffice to pay their debts and liabilities, which the Union Bank are to discharge, what is to

C. A.

1909

RE

ONTARIO  
BANK.

Official Referee.

C. A.

1909

RE

ONTARIO  
BANK.

Official Referee.

be done then? Then 'the Union Bank shall, out of the proceeds of the realisation by them of the assets and property specified in the schedule, retain the amount of such deficiency, together with interest;' and, in the event of those proceeds being insufficient to pay the amount of such deficiency and interest, 'the amount thereof shall be deemed and treated as being a debt due by the Bank of South Australia to the Union Bank.' That is to say, if there is a surplus, the Union Bank is to hand it over to the Bank of South Australia; if there is a deficiency, that deficiency is to be treated as a debt due from the Bank of South Australia and bearing interest. What is there wrong in that? What is there unbusinesslike in it? What is there beyond the powers of the company? Nothing that I can see. In substance it comes to this: 'If you take over the assets and pay our debts, then if you are under advances to us beyond the value of the assets—if that should be the net result—we will repay you those advances with interest.' What is there *ultra vires* in that?"

As to borrowing in a case of emergency, see also *In re International Life Assurance Co., Gibbs and West's Case* (1870), L.R. 10 Eq. 312.

The directors of the Ontario Bank, under the Bank Act, were not required to call their shareholders together for any purpose, either of borrowing or of liquidation. The Bank Act not only makes no provision for such a conference with the shareholders, but leaves the absolute power and discretion as to these actions in the directors as part of their management and disposition of the property, affairs, and concerns of the bank, and the provision of the Act under the heading "The Purchase of the Assets of a Bank," already referred to (secs. 99 to 111), do not take away these general powers of management of the directors for the purpose of enabling them to pay the bank's lawful debts.

These sections (99 to 111) were first enacted by the Bank Act Amendment Act, 1900, 63 & 64 Vict. ch. 26, secs. 33 to 44, and, read together, as I think they must be, they provide a way by which one bank may amalgamate with another and by which shareholders in the selling bank may be made to take shares of the purchasing bank in payment, either in part or in whole, for their respective interests in the selling bank. That such an arrangement should have the approval of the shareholders representing two-thirds of the subscribed capital stock of the selling bank, in view of the fact



that it is the shareholders' interest in the bank that is being dealt with, one can readily understand, but it is a different matter when it is sought to extend these sections for the purpose of limiting the powers of the directors to borrow for the purpose of paying the bank's lawful debts.

In the interpretation of the Act, these sections do not take away any of the powers of the directors conferred in the other parts of the Act already referred to. Lord Collins in *Toronto Corporation v. Toronto R.W. Co.*, [1907] A.C. 315, relying on *Hammersmith R.W. Co. v. Brand* (1869), L.R. 4 H.L. 171, referring to a heading in the contract, says (p. 324): "Such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation." The wording of the sections of the Bank Act in question, under the heading of "The Purchase of the Assets of a Bank," are the key to the interpretation of those sections, and they must be interpreted in the light of the other provisions of the Act.

Borrowing by any corporation for the sole purpose of paying its lawful debts (that is, debts incurred within its powers), has always been on a different footing from borrowing for other purposes, both as to the necessity of any express power to borrow and compliance with statutory or charter provisions and conditions.

Borrowing for the purpose of paying a lawful debt is simply exchanging one creditor for another, and is not borrowing in the sense of an increase to the liabilities of a company.

The following cases are referred to: *Blackburn Building Society v. Cunliffe Brooks & Co.*, 22 Ch.D. 61; *Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society* (1884), 9 App. Cas. 857; *Blackburn and District Benefit Building Society v. Cunliffe Brooks & Co.* (1885), 29 Ch.D. 902; *Wenlock v. River Dee Co.* (1887), 19 Q.B.D. 155; S.C. (1885), 10 App. Cas. 354; S.C., 36 Ch.D. 674; *In re Wrexham Mold and Connah's Quay R.W. Co.*, [1899] 1 Ch. 440; *Long v. Hancock* (1885), 12 S.C.R. 532, judgment of Mr. Justice Gwynne, at p. 545.

For these reasons, I have come to the conclusion that the agreement in question is valid and binding so as to form a sufficient basis for the account that the Bank of Montreal has filed as shewing its claim under the agreement against the Ontario Bank now in liquidation.

C. A.

1909

RE

ONTARIO  
BANK.

Official Referee.



C. A.  
1909  
RE  
ONTARIO  
BANK.

October 27, 1909. An appeal by the liquidators and W. J. McFarland from the Referee's certificate of his finding in accordance with the above decision, was dismissed by BRITTON, J.

The liquidators and McFarland appealed from the order of BRITTON, J., to the Court of Appeal.

January 26 and 27. The appeal was heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, J.J.A.

*J. Bicknell*, K.C. (*G. B. Strathy*, with him), for the liquidators, stated to the Court the position of his client, which was more that of an interested spectator than of an active participant in the argument.

*I. F. Hellmuth*, K.C. (*J. A. Paterson*, K.C., and *Glyn Osler*, with him), for W. J. McFarland and other contesting shareholders. The real question between the parties is as to the validity of the agreement of the 13th October, 1906, between the Ontario Bank and the Bank of Montreal, which, as the appellants contend, was a sale of its assets by the former to the latter bank, which was neither legally made nor legally consummated. The judgment of the Referee is based to a large extent upon considerations which have no bearing on the case, if the agreement is, as we contend, *ultra vires*. The Bank Act provides (secs. 99 to 111 inclusive) the only method by which such a sale and purchase can legally be effected, and it is conceded that the agreement was never submitted to the shareholders, nor approved by the Governor in council, as required by secs. 101 and 102. The Referee held that the transaction was not a purchase within the meaning of these sections, but was really one of borrowing and lending, and that is all that is meant when the agreement speaks of a "purchase by way of discount and of rediscount." Examination of the whole agreement, however, shews that all the *indicia* of a purchase are present, and none of a loan. In the latter case the securities would have been pledged, so that they could be returned to the borrower on payment of the advances made, but this agreement provides no means of retreat for the Ontario Bank. [MACLAREN, J.A.:—Do you contend that such a transaction as this could not have been carried out in any way before secs. 99-111 were passed in 1900? I should have thought that these sections were of an enabling, rather than of a prohibitory, character.] We say that, from that time at all events, no sale can

be made except under these sections, and we cannot look at the history of the legislation in construing a statute. [Moss, C.J.O.:—It may, however, sometimes be allowable and helpful to do so.] Such considerations cannot alter the effect where the language is as clear as it is in these sections. Where an express power is given, no other power can be implied. [MACLAREN, J.A., suggested that the bank might have the power to sell, under sec. 30 of the Interpretation Act, which was an express provision.] That section only applies where no contrary intention appears by the Act, and such an intention appears here. Referring to the various clauses of the agreement, that providing for a warranty is applicable both to a sale and to a loan, while clause 11 is only applicable to a sale, as by it the Bank of Montreal is put “in possession and control of all the offices, branches, and agencies of the Ontario Bank,” a provision which is quite at variance with the idea of a loan, as a borrower would wish to retain possession in order to enable him to pay off the loan. In this connection the 9th clause should be looked at, by which the Ontario Bank practically agrees to go out of business as a bank—also the 16th clause, by which the Bank of Montreal agrees in effect to pay \$150,000 for the goodwill of the business. A purchaser often pays for goodwill, but not a lender. The Ontario Bank could never repay the money advanced under this agreement for the agreement itself takes away the opportunity and means of doing so. Where permissive powers are given, as they are by these sections of the Act, they are in fact imperative: Maxwell on Statutes, 4th ed., pp. 195, 196; *Salomon v. Salomon & Co.*, [1897] A.C. 22, *per* Lord Watson at p. 38. The appellants do not concede that this transaction could have been carried out under the law as it existed previously to the enactment of these sections, as the bank charters do not authorise a sale of this nature: *Ashbury Railway Carriage and Iron Co. v. Riche*, L.R. 7 H.L. 653. *Bank of Australasia v. Breillat*, 6 Moo. P.C. 152, is distinguishable, as in that case the invalid terms which were held not to invalidate the agreement as a whole, were not, as in this case, of the essence of the agreement.

*J. A. Paterson*, K.C., on the same side. The transaction in question is a sale, not a mortgage, and without the aid of the statute is *ultra vires*, as there is no inherent common law right in a bank to enter into such an agreement: *Attorney-General v. Great Eastern*

C. A.  
1910  
RE  
ONTARIO  
BANK.

C. A  
1910  
RE  
ONTARIO  
BANK.

*R.W. Co.*, 5 App. Cas. 473, where the *Ashbury* case, already cited, is referred to; *Wenlock v. River Dee Co.*, 36 Ch.D. 674, at p. 685 (n). It is also submitted that the directors of the Ontario Bank had no power to pledge the double liability of its shareholders, nor had the Bank of Montreal the power to lend money upon the pledge of such liability. The *Breillat* case, so much relied on by the respondents, is clearly distinguishable for the reasons already adduced, and also because there it was a question of partnership, and not of corporate powers, and there was no such restraining statute as we have in the present case.

*W. Nesbitt, K.C.*, (*J. J. Gormully, K.C.*, and *J. A. Worrell, K.C.*, with him), for the respondents. From a consideration of the whole evidence, it appears that the transaction in question was not a sale of the assets of the Ontario Bank, as contended by the appellants, but a case of rendering assistance in a time of crisis to a bank which was in a desperate condition. That bank did not go out of business after the making of the agreement, but appointed a capable board of directors, which had many meetings and transacted a good deal of business. Referring to the various clauses of the agreement, it becomes apparent that the arrangement therein expressed is not a sale and purchase of assets within the meaning of secs. 99 to 111 of the Bank Act, but one by which the Bank of Montreal, by rediscounting certain bills of the Ontario Bank, and making other necessary advances, rendered such financial assistance to the latter bank as enabled it to provide for pressing liabilities that could not otherwise be met. I refer to Hart on Banking, 2nd ed., p. 616, and to schedule D., required by sec. 112 of the Bank Act, which shews that bills rediscounted are recognised by the Act. Clause 4 of the agreement could not refer to a sale, as under it the Bank of Montreal is a trustee of the proceeds of the discount and rediscount for certain purposes. The 9th clause, by which the Ontario Bank agrees not to carry on business except for certain purposes, was necessary in order to prevent the incurring by that bank of new liabilities. The 16th clause is not a sale of goodwill, as contended by the appellants—it is not an agreement to give \$150,000, in any event, but a sum to be paid on certain contingencies by the respondents, in reduction of the costs of the advances made by them, in consideration of the indirect benefit that might accrue to them through obtaining additional customers and depositors.

The sections of the Bank Act relied on by the appellants do not destroy the inherent right of the directors to manage the concerns of their bank, but are facultative in their nature, giving powers which are additional to, and not restrictive of, the powers possessed by banks and their directors before these sections were passed: Interpretation Act, sec. 30 (a); Bank Act, secs. 19, 29, 76 (d) and (c); *Kelly v. Electrical Construction Co.* (1907), 16 O.L.R. 232, at pp. 238, 239; *Hovey v. Whiting* (1887), 14 S.C.R. 515, at pp. 519, 520, 532, 533, 534. We rely with great confidence on the *Breillat* case, already cited—see especially p. 182 and pp. 191-194. The following cases were also referred to: *Pickering v. Ilfracombe R.W. Co.* (1868), L.R. 3 C.P. 235, at p. 249; *National Bank of Australasia v. Cherry* (1870), L.R. 3 P.C. 299, at p. 307; *Ayers v. South Australian Banking Co.* (1871), L.R. 3 P.C. 548, at p. 559; *Rolland v. La Caisse d'Économie Notre-Dame de Québec* (1895), 24 S.C.R. 405, at pp. 408, 409.

*J. J. Gormully*, K.C., on the same side. It is shewn by the evidence that this agreement was an eminently fair one, and advantageous alike to the shareholders and creditors of the Ontario Bank and to the general community. The assets really belonged to the creditors, when the agreement was made, and it was the primary duty of the directors to realise the assets to the best possible advantage: *Hovey v. Whiting*, *supra*, per Gwynne, J., at pp. 533, 534. The main purpose of the agreement was to make immediate provision for the payment of the liabilities of the Ontario Bank, as stated in the recital with which it begins, and which is the key to the whole agreement. Purchase is only spoken of in the 2nd clause, except by way of reference, and the purchase there spoken of "by way of discount and of rediscount" is properly construed in the judgment of the Referee, as being perfectly consistent with the view of the respondents as to the nature of the transaction. The 9th clause is merely ancillary to the others, and is a proper and reasonable provision against the incurring of further liabilities, of which, but for that clause, there might be an endless chain. The agreement as a whole is one that should be reasonably and benevolently interpreted, in view of the peculiar circumstances which rendered it necessary: *Lindley on Companies*, 6th ed., p. 289. Even if you assume that some provisions of the agreement are *ultra vires*, these can be rejected, and the respondents can fall back on the

C. A.  
1910  
—  
RE  
ONTARIO  
BANK.



C A.  
1910  
RE  
ONTARIO  
BANK.

covenants on the basis of which the account has been taken, and are not compelled, as argued by the appellants, to fall back upon their right of subrogation. The sections of the Bank Act upon which the appellants rely do not take away or restrict the powers of banks under the law merchant, which should be recognised by the Court. *Montgomery v. Ryan* (1908), 16 O.L.R. 75, was also referred to.

*Hellmuth*, in reply. Counsel for the respondents have dwelt at great length on the circumstances that attended the making of the agreement in question, but the Court cannot look at circumstances which have their consummation in a document executed under seal. For that proposition the judgment of the Privy Council in *Dominion Coal Co. v. Dominion Iron and Steel Co.*, [1909] A.C. 293, is sufficient authority. The circumstance that the parties were in a hurry is no factor in the case, nor have the terms "assistance" and "aid" any such magic as to turn what was a sale into a loan. I refer to Grant's Law of Banking, 5th ed., p. 294, which shews that discounting does not necessarily imply a loan, also on the same point to *Jones v. Imperial Bank of Canada* (1876), 23 Gr. 262, at p. 270, and *Carstairs v. Bates* (1812), 3 Camp. 301, at p. 302. The respondents' contention that part of the agreement may remain good, even though other portions are invalid, has no force in a case where a statute makes the whole agreement void.

April 18. Moss, C.J.O.:—This is in form an appeal by the liquidator of the Ontario Bank and by W. J. McFarland and others, shareholders of the bank, from an order pronounced by Britton, J., whereby he affirmed the decision or ruling of an Official Referee with respect to the mode of proof of the claim preferred by the Bank of Montreal as a creditor of the Ontario Bank.

The claim of the Bank of Montreal as a creditor of the Ontario Bank, presented to the liquidator, was by the direction of the Official Referee allowed in full as claimed. Further proceedings ensued, and, the matter again coming before the Official Referee for adjudication, he made the ruling now appealed from. From the report of the proceedings before him and the statements of counsel before this Court, it appears that, at the suggestion and with the concurrence of counsel, the Official Referee's ruling was affirmed, without argument, by Britton, J.



In substance, therefore, the appeal is from the Official Referee. The matter was evidently very carefully considered by him, and he has set forth fully the circumstances of the case, and the reasons for his conclusions.

In course of the inquiry by the Official Referee into the claim of the Bank of Montreal as a creditor of the Ontario Bank, a question was raised as to the form of the claim, and as to the nature of the proof in support of it, turning upon the terms of a certain agreement between the banks, the validity of which was questioned on behalf of certain shareholders.

And, as appears from the Referee's certificate, he, with the consent of counsel representing all parties concerned, proceeded to determine *in limine* the question whether or not the agreement in question was valid and binding in whole or in part upon the Ontario Bank and its shareholders, and he determined and found that it was valid and binding so as to form a sufficient basis for taking the account.

The principal and indeed the only substantial objection to the validity and binding effect of the agreement, urged on behalf of the appellants, was that it was in reality a transaction of sale by the Ontario Bank, and a purchase by the Bank of Montreal, of the assets of the first named bank, that it fell within the provisions of secs. 99 to 111, inclusive, of the Bank Act, and was not legally made or legally consummated in accordance with those provisions, and was *ultra vires*. The Referee was of opinion that the transaction did not fall within the provisions of those sections; that it was an arrangement which was within the powers of the board of directors to enter into; that it was binding; and that the bank of Montreal was entitled to make proof of its claim against the estate of the Ontario Bank upon the footing of it.

No question arises of priority over other creditors; neither does any question as to the right of the Bank of Montreal to a preferential or privileged claim against the assets. The claim is simply as a creditor of the Ontario Bank, now in course of liquidation in due course of law.

It is, of course, common ground that the transaction in question was not carried through in conformity with the requirements of the above-mentioned sections of the Act. The question is, whether

C. A.

1910

RE

ONTARIO  
BANK.

MOSS, C.J.O.

C. A

1910

RE

ONTARIO  
BANK.

Moss, C.J.O.

it was of such a character as to call for compliance with those requirements.

In considering the question and viewing the circumstances attending and surrounding the entering into the agreement in question, the first thing that strikes one as very apparent is, that there was no intention on the part of any of the parties concerned to enter into and carry out a transaction which would involve recourse to the provisions of these sections.

The circumstances under which it was entered into, the utter inability of the Ontario Bank to make immediate provision for meeting or redeeming the circulation, the failure of efforts towards an arrangement for amalgamation with the Royal Bank of Canada, the obvious impossibility of inducing any bank with knowledge of the condition of affairs to enter into any such arrangement, and the urgent necessity for speedy and effective action, the only means by which the effects of the impending calamity could be minimised and made to entail the least possible loss to the shareholders, repel any such notion. It is manifest that nothing was further from the minds of the parties than the intention at this time, when prompt and immediate measures were imperatively called for, to do something which would have the effect of tying up all the affairs of the Bank until the sanction of the shareholders and the Governor in Council could be obtained.

It is also abundantly clear that the transaction was beneficial and advantageous alike to the depositors, the holders of bills and notes in circulation, and the other creditors, and the shareholders, and that in its actual working-out it has enabled the property and assets of that bank to be dealt with and realised without the very serious sacrifice that but for the arrangements made would have been inevitable. That in entering into it the directors acted in good faith, and in what they believed to be the best interests of the bank and its shareholders, seems beyond question. Was it one within the scope of their powers and authority?

The arrangement is evidenced by the instrument dated the 13th October, 1906, under the corporate seals of the respective banks. And from it must be gathered, if it is to be gathered anywhere, the conclusion that the transaction was as contended for by the appellants.

A fair reading of the whole instrument, giving to each part its

proper effect in relation to the remainder, and bearing in mind the evident object and intention of the parties, leaves no reasonable doubt as to its meaning and effect. The strongest ground in favour of the appellants' contention is the use, in No. 2 of the operative clauses, of the expression "purchase by way of discount and of re-discount at the rate of six per cent." But, if these words are inconsistent with the general aim and scope of the instrument, not much force is to be attributed to them, and they should not be permitted to govern. But in truth they are not inconsistent, for they merely describe a species of dealing with a particular class of securities which is quite as consistent with a pledge as an absolute sale.

It was just as necessary for the purposes of a pledge for advances as for the purposes of a sale out and out that the property in and control of the securities should be vested in the Bank of Montreal. And to speak of a purchase by way of discount is simply to state the effect in law of discounting. In Hart on Banking, 2nd ed., p. 617, it is said that it is convenient to bear in mind that the word "discount" is often used in a very elastic and comprehensive sense. This is followed by a quotation from the judgment of Mr. Justice Story in the well-considered case of *Fleckner v. Bank of the United States* (1823), 21 U.S.R. (8 Wheaton) 338, at p. 351, in which occurs the following passage: "If, therefore, the discounting of a promissory note, according to the usage of banks, be a purchase . . . it is a purchase by way of discount." In an earlier passage he observed: "But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of the debt, which arises from the loan? If it is to discount, must there not be some chose in action, or written evidence of a debt, payable at a future time, which is to be the subject of the discount?"

In these passages the learned Judge appears to fairly describe what was contemplated in the purchase by way of discount and rediscount set forth in the 2nd clause of the agreement. Every other clause is consistent with the idea of advances, and some are entirely at variance with the notion of a sale of assets and nothing more. Many of the ordinary elements of a sale and purchase are not to be found, which it is inconceivable would be omitted if that was the intention.

The power of persons carrying on the business of banking to

C. A.

1910

RE

ONTARIO  
BANK.

Moss, C.J.O.

C. A.  
1910  
RE  
ONTARIO  
BANK.  
Moss, C.J.O.

obtain advances and to transfer by way of pledge such assets and securities as are required, has been long recognised. It is a necessary incident of the business of banking. To repeat the language of the learned author of Lindley on Companies, at p. 289 of the 6th ed., quoted by the Referee, "A power to borrow is so necessary to a banking company that its directors can scarcely be deprived of it; and there are several cases in the books in which their power was held to have been exercised so as to bind the company." Some of these cases have been referred to by the Referee, and in particular the decision of the Judicial Committee of the Privy Council in the case of *Bank of Australasia v. Breillat*, 6 Moo. P.C. 152. The plaintiff bank in that case was not constituted, nor were its powers defined by statute, as in the case of Canadian banks. But there is nothing in the Bank Act which affects or controls that general power, which is really a part of the general law merchant.

As the Referee has pointed out, a bank, in addition to all the specific matters set forth in sec. 76 of the Bank Act, is authorised to engage in and carry on such business generally as appertains to the business of banking. And, by secs. 19 and 29, the board of directors is invested with wide and extensive powers of management and disposition over the stock, property, affairs, and concerns of the bank, and over all such matters as appertain to the business of a bank.

These properly and naturally draw to them the essential power and authority to take such steps as may seem necessary to protect the interests of the bank, and, amongst others, to obtain such advances as may appear to be called for by the necessities of the occasion.

It was, therefore, not beyond the power of the Ontario Bank or the authority of its board of directors to enter into an arrangement with the Bank of Montreal whereby that bank should advance the funds necessary to meet the calls made upon the other and to enter into such suitable and necessary engagements as were proper to secure the reimbursement of such advances.

And such was and is the nature of the agreement in question. If that be so, it seems unnecessary to inquire whether some of its provisions were such as could be enforced against the Ontario Bank.

They appear to have been designed with a view to conserving the resources of the Ontario Bank and disposing in the most ad-



vantageous manner of the available assets. The objections made to them appear to be satisfactorily dealt with and disposed of by the Referee, and there appears to be no reason for differing with him in his conclusions.

The appeal fails and should be dismissed.

MACLAREN, J.A.:—The validity of the agreement of the 13th October, 1906, between the Ontario Bank and the Bank of Montreal, may be tested by two simple questions. First, would these banks have had the right to make this agreement under the law as it stood in 1900, before the Bank Amendment Act of that year (now secs. 99 to 111 of the present Bank Act, R.S.C. 1906, ch. 29)? If not, then the agreement is invalid, as it is not pretended that the provisions of these special sections were complied with. If, however, the answer be in the affirmative, then a further question arises, namely: Did the enactment of these amending sections have the effect of providing that no such transaction could be carried out except in accordance with the provisions and the observance of the formalities there laid down?

Let us endeavour to get a clear idea of what the agreement in question in substance really was. I think it may fairly be summarised as follows:—The Bank of Montreal, at the request of the Ontario Bank, undertook to meet the liabilities of the latter as they fell due, and, in order to assist the Bank of Montreal to do so, the Ontario Bank agreed to hand over its available commercial assets for that purpose, the Bank of Montreal having full authority to realise upon these assets as it might see fit. The Ontario Bank warranted that the assets so handed over were on the 29th September, 1906 (the date of the last monthly return to the Government) of the value of \$16,249,080.46, and that the notes and other liabilities of the bank did not exceed \$15,272,271.22. The Ontario Bank agreed to place its offices, staff, etc., at the disposal of the Bank of Montreal, and to do all in its power to carry out the terms of the agreement. The advances of the Bank of Montreal were to bear interest at the rate of six per cent., and, if there was a surplus after payment of the liabilities, it was to credit the Ontario Bank on the final adjustment of accounts with \$150,000 for the indirect benefit received.

First, would such an agreement have been valid before the

C. A.  
1910  
RE  
ONTARIO  
BANK.  
MOSS, C.J.O.



C. A.

1910

RE

ONTARIO  
BANK.

Maclaren, J. A.

amending Act of 1900? It is to be observed that the transaction is not attacked as not having been entered into in good faith, or on the ground of its not being in the interest of the Ontario Bank, but solely on the ground of its having been *ultra vires*; that the Ontario Bank could not legally dispose of these assets to the Bank of Montreal nor could the latter acquire them.

These banks, being corporations created by the Bank Act, have, in addition to the powers conferred upon them by that Act, the power under the Interpretation Act, R.S.C. 1906, ch. 1, sec. 30, "to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure."

By sec. 76 of the Bank Act, "the bank may . . . (c) deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign and other public securities; and (d) engage in and carry on such business generally as appertains to the business of banking."

The powers conferred by these two sections are wide enough to include the transaction in question. Clause 2 of the agreement speaks of it as being a "purchase by way of discount and rediscount." Strictly speaking, it is not a sale by the Ontario Bank and a purchase by the Bank of Montreal of the assets in question. There is no price named, nor do we find the other *indicia* of a sale. It is in substance rather a loan or advance by the Bank of Montreal of the money necessary to meet the liabilities of the Ontario Bank as they become due, and the Bank of Montreal is to apply the money realised from the securities transferred to it towards meeting those liabilities and repayment of these advances with interest.

Under the above mentioned sections there is, in my opinion, ample authority for the agreement in question. It was in reality a borrowing by the Ontario Bank and a lending by the Bank of Montreal, a dealing in the bills of exchange, promissory notes, and other negotiable securities, an alienation by the Ontario Bank and an acquisition by the Bank of Montreal, and it was surely such business generally as appertains to the business of banking. This Court

decided in *Montgomery v. Ryan*, 16 O.L.R. 75, that a bank incorporated under our Bank Act could sell either the account of one of its customers or the promissory note which evidenced the debt. See also *Allen v. Sharp* (1848), 17 L.J. Ex. 209, at p. 212, and Halsbury's Laws of England, vol. 1, pp. 629, 631.

The Bank Act of 1890 evidently contemplated and authorised on the part of banks such transactions as we have in this case. In schedule D we find the form of the return which was to be made to the Government monthly. Among the liabilities are: "6. Loans from other banks in Canada, secured \$ . ." And among the assets: "5. Loans to other banks in Canada, secured \$ . ." In 1900 this schedule was slightly changed, and these items read as follows: "7. Loans from other banks in Canada, secured, including bills rediscounted, \$ . ." And: "5. Loans to other banks in Canada, secured, including bills rediscounted, \$ . ." The actual amount advanced by the Bank of Montreal at the end of each month after the transaction in question would appear under these heads in the returns of the Ontario Bank and the Bank of Montreal respectively. Parliament thus formally recognised such transactions as this and provided that they should be specifically reported from month to month.

The present case is well within the principles laid down by the Judicial Committee in *Bank of Australasia v. Breillat*, 6 Moo. P.C. 152, mentioned and relied upon by the Official Referee in the reasons for his judgment. The powers of directors under our Bank Act appear to be quite as ample as were those of the directors of the Bank of Australasia.

The directors of the Ontario Bank had full power under the Bank Act to consummate this transaction without consulting the shareholders. By sec. 19, "the stock, property, affairs and concerns of the bank shall be managed" by them; and by sec. 29, the directors "may make . . . regulations . . . with respect to, (a) the management and disposition of the stock, property, affairs and concerns of the bank; (b) the duties and conduct of the officers, clerks and servants employed therein; and (c) all such other matters as appertain to the business of a bank." Apart from secs. 99 to 111, which will be considered presently, there is no provision or suggestion in the Act that the shareholders have any rights or powers with respect to such a transaction as this.

C. A.

1910

RE

ONTARIO  
BANK.

Maclaren, J.A.

C. A.

1910

RE

ONTARIO  
BANK.

Maclaren, J.A.

It was argued before us that this was in part a loan upon the stock of the Ontario Bank and upon the double liability, which is forbidden by the Act. Even if it were so, the only result would be that the Bank of Montreal would not be able to get what it stipulated for; the Ontario Bank would still be obliged to repay the loan with interest. But an examination of the instrument shews that this is not its real nature, and the Bank of Montreal is not now claiming any preference or the enforcement of any security upon the stock or double liability of the Ontario Bank; it simply seeks to rank as an ordinary creditor for its advances and interest thereon.

As to the policy of the transaction we are not called upon to pronounce. It was admitted that this was for the directors, if within their powers. Being in urgent need of money, facing a crisis that would in two or three hours at most have compelled them to close the doors of the bank, the relief to be of any avail at all must be adequate to the emergency and the necessities of the bank; and there is no suggestion that anything less comprehensive would have been of the slightest value.

Having come to the conclusion that before the amending Act of 1900 this agreement would have been within the powers of the directors, there remains to be considered the further question whether this amendment took away the previous powers of the directors, and required such an agreement as this to be carried out exclusively under the provisions and subject to the formalities of secs. 99 to 111.

An examination of these sections will shew that they are not prohibitive, but enabling. They are not designed to prevent a bank from selling any of its assets to another bank; but to enable a bank to acquire the assets of another bank and to compel a minority of the shareholders in the selling bank to accept shares of the purchasing bank therefor, provided such minority do not hold one-third of the shares of the selling bank.

It is common knowledge that these sections were enacted to enable the Canadian Bank of Commerce to acquire the assets of the Bank of British Columbia, with which it was then in treaty, and to be able to do under a general Act what had previously required a special Act of Parliament.

Of course, these provisions would have been utterly useless and unavailing in the present instance. They require a special general

meeting of the shareholders of each of the banks, which can only be held, under sec. 31 of the Bank Act, after six weeks' public notice, and their action must be approved by the Governor in council: sec. 102. In the present case the representative of the Bank of Montreal arrived at Toronto only about eight o'clock on the morning of the 13th October, the officials of the Ontario Bank having spent nearly the whole of the preceding night in negotiations with the officials of the other Toronto banks without result, the Bank of Montreal not being there represented. Any relief to be effectual must be forthcoming at ten o'clock, when the bank was to open its doors. If it had opened its doors without having received assistance, the evidence is clear that it would have been obliged to close them again almost immediately. Permission to put up the name of the Bank of Montreal in the offices of the Ontario Bank was given, and this, with a supply of money, averted a run and a panic which would have been immediately fatal to the Ontario Bank, and disastrous to the other banks of this city and the country at large.

In my opinion, the claim should be allowed and the appeal dismissed.

OSLER and GARROW, JJ.A., agreed in dismissing the appeal.

C. A.

1910

RE

ONTARIO  
BANK.

Maclaren, J.A.



[IN CHAMBERS.]

1910

RE GREEN V. CRAWFORD.

April 22.

*Division Courts—Jurisdiction—Claim over \$100—Division Courts Act, secs. 72 and 72a—Promissory Note—Production and Proof of Signature—Investigation of Larger Account—Matters of Defence.*

Under sec. 72, sub-sec. 1 (d), of the Division Courts Act, R.S.O. 1897, ch. 60, and sec. 72a (added by 4 Edw. VII. ch. 12, sec. 1), a Division Court has jurisdiction to entertain a claim upon a promissory note for over \$100, but not exceeding \$200; all that is necessary to make out the plaintiff's case being the production of the note and proof of the signature of the defendant; and the jurisdiction is not ousted because it appears that there were other dealings between the parties, and that the note is an item of an account which the plaintiff kept against the defendant and another, secured by a mortgage, even if it is necessary to investigate the account for the purpose of ascertaining whether the promissory note has been paid in whole or part.

MOTION by the plaintiff for a mandamus to the Junior Judge of the County Court of the County of Elgin commanding him to try this action.

April 19. The motion was heard by MEREDITH, C.J.C.P., in Chambers.

*J. M. Ferguson*, for the plaintiff.

*Shirley Denison*, for the defendant.

April 22. MEREDITH, C.J.:—The action was brought in the 3rd Division Court in the county of Elgin, and the plaintiff's claim is upon a promissory note made by the defendant for \$140, and to recover the amount of it, with interest, in all \$154.60.

At the trial the plaintiff produced and proved the making of the promissory note. On his cross-examination it appeared that he had other dealings with the defendant and a Mrs. James; that he had an account in his books with them, that the amount of the promissory note formed one of the items of this account, and that he had taken a mortgage from Mrs. James covering the amount of the account.

Upon this appearing, the learned Judge stopped the case, holding that the Court had "no jurisdiction to pursue the inquiry."

I am, with respect, of opinion that the ruling of the learned Judge cannot be supported.



The Division Court has jurisdiction in actions for the recovery of "a debt or money demand the amount or balance of which does not exceed \$200, where the amount or original amount of the claim is ascertained by the signature of the defendant:" R.S.O. 1897, ch. 60, sec. 72, sub-sec. 1(*d*) ; and by 4 Edw. VII. ch. 12, sec. 1, it is provided:—

"1. The Division Courts Act is amended by adding the following section thereto:—

"72*a*. The amount or original amount of the claim shall not be deemed to be ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents within the meaning of clause (*d*) of sub-section 1 of section 72, when in order to establish the claim of the plaintiff or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it."

The plaintiff's claim, in my opinion, comes within the provisions of clause (*d*) of sub-sec. 1 of sec. 72, as amended by 4 Edw. VII. ch. 12, sec. 1.

He sues on the promissory note only, and to make out his case all that was necessary was the production of the note and proof of the signature of the defendant. The question whether the claim on it had become merged in the mortgage, if that question could or did arise, was matter of defence; and the fact that the amount of the note formed one of the items in the account kept by the plaintiff with the defendant and Mrs. James, if of any importance at all, did not affect the question of jurisdiction. These were matters of defence, which the Judge, having jurisdiction to try the action, had jurisdiction to pass upon.

If, as would appear to have been the view of the learned Judge, it was necessary to investigate the account for the purpose of ascertaining whether the promissory note had been paid in whole or in part, that also did not affect the question of jurisdiction; and, in my opinion, nothing appeared in the evidence to oust the jurisdiction of the Division Court.

The order must go as asked, and there will be no order as to costs.

1910  


---

 RE  
 GREEN  
 v.  
 CRAWFORD.  


---

 Meredith, C.J.

## [IN THE COURT OF APPEAL.]

C. A.

1910

Jan. 17

REX V. MACDONALD.

*Criminal Law—Theft—Jurisdiction of Police Magistrate for City—Summary Trial—Criminal Code, secs. 782, 783—Conviction—Warrant of Commitment—Defects—Habeas Corpus—Remand upon Substituted Warrant—Appeal—Certiorari Granted to Crown—Return of Proceedings at Trial—Election of Prisoner—Right of Re-election—Refusal of Postponement—Sentence—Imprisonment in Central Prison—Hard Labour.*

Where the warrant of commitment under which a prisoner is detained is defective, the Judge hearing an application for discharge, on the return of a *habeas corpus*, may remand the prisoner to custody under a substituted warrant. The provisions of the Criminal Code respecting Extraordinary Remedies, secs. 1120 to 1132, have taken the sting out of technical objections based upon defects in warrants of commitment.

Where the prisoner obtains a writ of *habeas corpus*, the Crown may have the proceedings brought up on *certiorari*; nothing in the powers conferred by the 5th section of the provincial Habeas Corpus Act lessens the right to such a writ.

The proceedings being removed, the evidence shewed that the prisoner elected summary trial, and that he did not need a postponement of the trial to obtain witnesses; so that objections based on an affidavit of the prisoner, to the effect that he did not really elect summary trial, and that he was denied an opportunity of making his full answer and defence, could not prevail.

Where a prisoner has elected summary trial, he has no legal right to re-elect. The sentence being imprisonment in the Central Prison, the prisoner was subject to all the rules, regulations, and discipline of that prison during his term: R.S.C. 1906, ch. 148, secs. 46, 47; R.S.O. 1897, ch. 308, sec. 30; and therefore the fact that the words "at hard labour" were stricken out of the conviction could have no substantial effect.

The prisoner was summarily tried by the police magistrate for a city upon a charge that he did assault and unlawfully take, steal, and carry away from the person of W. a sum of money, etc., and was convicted:—

*Held*, that the magistrate had jurisdiction: secs. 782 and 783 of the Criminal Code (the requirements of which were admittedly not observed) have no application to a trial by such a magistrate.

*Seem*, having regard to secs. 446 and 852 of the Criminal Code, that the offence was robbery, not merely theft; the evidence was of theft with very considerable violence.

THE prisoner was on the 26th October, 1909, charged, by an information and complaint laid before D. W. Dumble, police magistrate for the city of Peterborough, for that he (the prisoner) did, at the said city of Peterborough, on Monday the 25th day of October, 1909, assault and unlawfully take, steal, and carry away from the person of William P. Whitney a sum of money, to wit, \$38, and one gold watch and chain, contrary to the Criminal Code. He was brought before the police magistrate, under a warrant issued upon such charge, on the 27th October, 1909. He was not represented by solicitor or counsel, and, as he afterwards swore,

he asked for delay in order to obtain the assistance of a solicitor, but this was refused, and, being asked to elect, he elected to be tried by the magistrate, and pleaded not guilty. He was then remanded until the 2nd November, 1909, when he was again brought before the magistrate, and was represented by counsel, who asked leave to withdraw the election of the prisoner to be summarily tried by the magistrate. This was refused, and the trial proceeded. At the close of the case for the prosecution, the counsel for the prisoner asked for an adjournment, but this was refused; and the prisoner then testified on his own behalf. The magistrate on the 5th November, 1909, found the prisoner guilty of the offence charged, and adjudged that he be confined in the Central Prison at Toronto for the term of two years, less one day.

The prisoner was accordingly taken to the Central Prison. On the 15th November, 1909, he made affidavit that he was detained in the Central Prison under the warrant of commitment lodged with the warden thereof, a copy of which he exhibited. The warrant did not in terms allege that the prisoner had been convicted, but set forth, instead, that "afterwards, to wit, on the 5th day of November, in the year of our Lord one thousand nine hundred and nine, the said parties appeared before me, the said David William Dumble, Esquire, police magistrate, at the said city of Peterborough, in order that I should hear and determine the same, and the several proofs adduced to me in that behalf being by me duly heard and considered, and it manifestly appearing before me that the said complaint was fully proved," etc. The warrant was addressed to the Chief Constable or other police officers for the county of Peterborough "and to the keeper of the common gaol of the county of Peterborough."

The prisoner applied for and obtained a writ of *habeas corpus*; and the Crown subsequently obtained a *certiorari* in aid, under which a conviction in proper form was returned by the magistrate. In the printed form used the words "at hard labour" were stricken out.

The prisoner then moved for his discharge, and in one of his affidavits filed in support of the motion stated that the police magistrate, upon the evidence of the prosecutor being taken, failed to explain to the prisoner that he was not obliged to plead in answer to any charge, and that, if he declined so to plead or answer, he

C. A.  
1910  
—  
REX  
v.  
MACDONALD.

C. A.  
1910

REX  
v.

MACDONALD.

would be committed for trial in the usual way, as provided by sec. 782 of the Criminal Code.

The application for discharge came before CLUTE, J., in Chambers, on the 23rd November, 1909. The application was refused, and the prisoner was remanded to the custody of the Warden of the Central Prison; and it was further ordered "that the convicting magistrate have leave to file an amended warrant of commitment."

The prisoner appealed to the Court of Appeal from this order.

November 26, 1909. The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

*J. B. Mackenzie*, for the prisoner. The prisoner should be discharged from custody. When he appeared before the magistrate on the 27th October, 1909, he gave a bad consent to be tried summarily. Then, on the 5th November, his counsel was wrongly refused permission to withdraw this election; and also was improperly refused a postponement of the trial. On the 5th November the prisoner was ordered to be imprisoned. I submit that he was not properly sentenced. The magistrate was required to proceed under secs. 782 and 783 of the Criminal Code, and to comply strictly with the provisions of those sections. The Crown is wrong in contending that the offence was robbery, and that the magistrate had a right to proceed under the general sections, 777 and 778: *Regina v. Woodhall* (1872), 12 Cox C.C. 240; *Rex v. Beboning* (1908), 17 O.L.R. 23, per Osler, J.A., at p. 27. The magistrate put the question prematurely as to whether the prisoner wished to be tried summarily. Under sec. 1130 of the Code, the warrant of commitment must state a conviction, but in this case the warrant does not. The warrant is bad, and cannot be cured or amended: *Rex v. Nelson* (1908), 18 O.L.R. 484; *The Queen v. Lalonde* (1895), 9 Can. Crim. Cas. 501; *Regina v. Lavin* (1888), 12 P.R. 642; *Ex p. Ettamass* (1891), 2 B.C.R. 232; *The King v. Cooper* (1796), 6 T.R. 509, approving and following *The King v. Rhodes* (1791), 4 T.R. 220; *Regina v. Deane* (1853), 10 U.C.R. 464; *Daniel v. Philipps* (1835), 5 Tyrw. 293, at p. 307; *In re Woodruff* (1908), 16 O.L.R. 348. The Crown had no right to a *certiorari*. It was at the prisoner's option to have one or not: *In re Carmichael* (1864), 10 U.C.L.J.O.S. 325, at p. 326. *Rex v. Nelson*, *supra*, is not binding in this regard.



The Judge's order is wrong in that it does not declare whether the commitment is bad or not, but allows another to be filed, whereas it should have stated that the commitment was bad, and must be cured. Again, further detention has been ordered here, under sec. 1120 of the Code. I submit that this is *ultra vires* of the Canadian Parliament, being in contravention of the provisions of the Habeas Corpus Act, 9 Edw. VII. ch. 51 (O.) (I have given notice of this objection to the Minister of Justice, but he does not appear.) Under sec. 6 of the Habeas Corpus Act, a Judge must determine as to the sufficiency of a commitment, whereas under sec. 1120 of the Code he need not so determine. The Dominion Parliament has no power to amend the Habeas Corpus Act, passed by the Ontario Legislature. *Rex v. Lowery* (1907), 15 O.L.R. 182, declares the matter to be one of civil rights. The Canada Act 29 & 30 Vict. ch. 45 is *intra vires*. Besides, the Legislature has re-enacted the Act of 31 Car. II. ch. 2 (see p. xxxvi. of R.S.O. 1897, vol. 3). A magistrate has no power to convert a charge which he has no right to try summarily into one which he has a right so to try: *Rex v. Dungey* (1901), 2 O.L.R. 223. The magistrate had no power to remand for sentence under the common law. I also refer to *Regina v. Randolph* (1900), 32 O.R. 212; *Rex v. Hayward* (1902), 5 O.L.R. 65. In the conviction returned the words "at hard labour" are stricken out of the printed form.

*J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown. As to the offence, it was robbery, clearly falling within the terms of secs. 445 and 446 of the Code. Having reference to sec. 852 of the Code, no one could have any doubt as to what the offence was. Therefore, secs. 782 and 783 do not apply. See *The King v. McLeod* (1906), 12 Can. Crim. Cas. 73. So the magistrate had a right to proceed under secs. 777 and 778. The Crown can have a *certiorari* at any time: *Rex v. Nelson*, 18 O.L.R. 484. The Judge has power under sec. 1120 of the Code to order the further detention of the prisoner, and to direct the issue of a new warrant: *Rex v. Graf* (1909), 19 O.L.R. 238, following *Rex v. Morgan* (1901), 2 O.L.R. 413, 3 O.L.R. 356. This decision makes *Rex v. Randolph*, *supra*, cited in the prisoner's favour, no longer to be depended upon. As to sec. 1120 being *ultra vires*, we submit that that section is only supplementary of the Habeas Corpus Act, not contradictory. In answer to the contention that there was no power to remand, we submit that the prisoner was held under the original warrant.

C. A.

1910

REX

v.

MACDONALD.



C. A.            *Mackenzie*, in reply. Section 1124 of the Code is not applicable  
1910           here. That section only applies where there is a motion to quash  
REX           a conviction.

v.

MACDONALD.

Meredith, J.A.

January 17, 1910. The judgment of the Court was delivered by MEREDITH, J.A.:—None of the many grounds upon which this appeal has been endeavoured to be supported, seem to me to have any great weight, and most of them 'to deserve no more than a general refutation, but for the industry displayed in evolving them and the earnest sincerity with which they were presented.

It is said that the original warrant of commitment was defective, but another was substituted for it; and the learned Judge, against whose ruling the appeal is made, without considering the objections to the first warrant, remanded the prisoner to custody under the substituted warrant. That that was quite within his power has been long established. It was indeed a common practice. The case of *The Queen v. Richards, Bird, and Others* (1844), 5 Q.B. 926, affords an instance. In addition to that, the provisions of the Criminal Code respecting Extraordinary Remedies, secs. 1120 to 1132, have quite taken the sting out of technical objections based upon defects in warrants of commitment, among other like objections.

With which Legislature now lies the power to legislate respecting the liberty of the subject, as affected by *habeas corpus* proceedings in criminal matters, is a question quite remote from anything that need be decided in this case, and so, notwithstanding Mr. Mackenzie's industry, ought not to be considered.

The application for the prisoner's discharge was based upon allegations contained in an affidavit made by him as to what took place upon his trial; as well as upon the formal objections to the warrant and other proceedings.

Upon the allegations thus made two points are made: (1) that the prisoner did not really elect summary trial, and that, if he did, he should not have been refused a re-election such as he, through his counsel, afterward sought; and (2) that the prisoner was denied an opportunity for making his full answer and defence, in being refused a postponement of the trial to procure witnesses.

No affidavits appear to have been filed in answer, the Crown apparently relying upon the record of the proceedings at the trial

as a sufficient answer. These papers were brought up with the conviction by means of a writ of *certiorari* issued at the instance of the Crown.

For the prisoner it was urged that there was no power to bring the papers up in that manner, and that therefore they cannot be used as evidence in these proceedings. But why might not the Court direct that the proceedings be so brought up? And what is there in this case limiting the right of the Attorney-General *ex officio* to the writ? Nothing in the powers conferred by the 5th section of the provincial Habeas Corpus Act lessens the right to such a writ.

But whether brought up on *habeas corpus*, or otherwise, I would not have determined the question of the legality of the imprisonment upon the mere affidavit of the prisoner.

Fortunately, in the interests of truth, the prisoner was examined at the trial as a witness in his own behalf, and proved, as the record also shews, that he did elect summary trial; and proved also that he had once before elected and been tried in like manner upon another charge; and, lastly, proved that he had no witnesses and so did not need any postponement of the trial for that purpose. The trial was actually adjourned from a morning until an afternoon sitting, after the evidence for the prosecution had been given; and the prisoner was represented by counsel; but the election was made on the 27th October, when he was not represented by counsel, the trial being postponed until the 2nd November. These grounds therefore fall to the ground.

Then, in regard to a re-election, I am not aware of any legal right in the prisoner, such as he now claims, in that respect. Under the procedure respecting speedy trials—sec. 828—the right to re-elect is expressly given, in cases where a trial by jury has been demanded, but even in such cases the re-elected mode of trial is not allowed if the Judge is of opinion that it would not be in the interests of justice; and under sec. 830 a person who has elected trial by jury may afterward re-elect speedy trial before a County Court Judge. The prisoner having been denied no legal right in this respect, there is no power here to give him any relief.

The point that the words “at hard labour” are stricken out of the conviction seems to me to have no substantial effect; the sentence is imprisonment in the Central Prison, and that made the prisoner subject to all the rules, regulations, and discipline of that

C. A.

1910

REX

v.

MACDONALD.

Meredith, J. A.

C. A.

1910

REX

v.

MACDONALD.

Meredith, J.A.

prison during his term of imprisonment: R.S.C. 1906, ch. 148, sec. 46: see also sec. 47: and R.S.O. 1897, ch. 308, sec. 30.

The last point, and that evidently thought the chiefest, is: that the magistrate had jurisdiction to try the prisoner under secs. 782 and 783, only, and that, as he admittedly did not conform to the requirements of those sections in some material respects, the whole proceedings were of no legal effect. It is said that there is a conflict between sec. 778 and those two sections, and that, as the latter apply only to such cases as this, which it is contended is nothing more than larcency, they must prevail; good logic, but based upon an entirely erroneous statement of the facts, as, I think, a few moments' reflection, coupled with some knowledge of the practice in criminal cases, must prove.

Under the several enactments respecting the prompt and summary administration of criminal justice in certain cases: see 20 Vict. ch. 27; 22 Vict. ch. 27; C.S.C. ch. 105; 32 & 33 Vict. ch. 32 (D.); R.S.C. 1886, ch. 176; 55 & 56 Vict. ch. 29, secs. 782 to 809; and the present Criminal Code, secs. 778 to 798: jurisdiction was conferred upon certain judicial officers, to try, with the consent of the accused, certain minor indictable offences; and such jurisdiction is now conferred upon "a magistrate" under sec. 773 of the Criminal Code, the meaning of the word "magistrate" being defined in sec. 771. In regard to theft the jurisdiction conferred by sec. 773 is confined to cases in which the value of the stolen property does not, in the opinion of the magistrate, exceed \$10. The mode of procedure under the jurisdiction conferred by sec. 773 is provided in sec. 778; so far it is quite plain sailing.

By sec. 782 still further jurisdiction in cases of theft, false pretences, and receiving stolen property, is, under the circumstances set out in that section, conferred upon the "magistrate;" and, under the earlier enactments, like jurisdiction, but more limited as to the punishment which might be inflicted, was conferred upon the judicial officers named in them. This jurisdiction can be exercised only if, and when, the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the accused upon trial for the offence charged, and with the consent of the accused. The procedure in such cases is provided for in that and the next following sections. Still it is quite plain sailing. The cases thus specially provided for are cases which the magistrate

has no general jurisdiction to try; but which are before him as indictable offences, and he is to proceed as in such cases until the evidence for the prosecution satisfies his mind upon two points: (1) that it is sufficient to require that the accused be committed for trial; and (2) that the offence is not one of so serious a character that it may not be tried in a summary way; being satisfied upon these two points, he is to reduce the charge to writing and to proceed in the manner set out in the two sections; if the accused elects summary trial and pleads not guilty, he is to be remanded to gaol to await his trial before the magistrate in the usual course; the remand being made to enable the parties to prepare for trial, having come before the magistrate then for the preliminary investigation of an indictable offence only. Under the earlier enactments there is of course the further condition that the magistrate shall be satisfied that the limited punishment which he could inflict under them would be adequate.

In one of the earlier enactments, 38 Vict. ch. 47 (D.), I think, very much larger powers regarding such summary trials were conferred upon police magistrates in this Province only; and that provision has since been contained in all the re-enactments of the Summary Trials Act; and is now sec. 777 of the Code; and that power has since been extended, by 63 & 64 Vict. ch. 46, sec. 3, I think, to police and stipendiary magistrates in cities and incorporated towns in every other part of Canada. These amendments to the summary trials enactment confer upon such magistrates the power, with the consent of the accused, to try any offence which may be tried at a Court of General Sessions of the Peace; and so secs. 782 and 783 have no application to a trial by such a magistrate; but do apply to those magistrates who have no power to try the cases provided for in sec. 782 except under the provisions of that section. This also I think quite plain, notwithstanding the labour and earnestness with which it was urged that an attempt to fit the different provisions of the enactment together without any clashing would be found to be like trying to solve an unsolvable puzzle.

But if this were not so, I would be inclined, having regard to secs. 446 and 852 of the Criminal Code, to consider the offence with which the prisoner was charged, and of which he was found guilty, robbery, not merely theft; the evidence was of theft with very considerable violence.

I would dismiss the appeal.

C. A.

1910

REX

v.

MACDONALD.

Meredith, J.A.



## [DIVISIONAL COURT.]

D. C.

1910

April 28.

MCMURRAY v. EAST NISSOURI (SECTION 3) PUBLIC SCHOOL BOARD.

*Public Schools—Engagement of Teacher—Absence of Writing and Seal—Public Schools Act, 1 Edw. VII. ch. 39, sec. 81 (1)—Imperative Enactment—Costs.*

By sec. 81, sub-sec. 1, of the Public Schools Act, 1 Edw. VII. ch. 39, "all agreements between trustees and teachers shall be in writing, signed by the parties thereto, and shall be sealed with the seal of the corporation." In the original of this enactment the words "to be valid and binding" were printed after the word "teachers," but were dropped in the consolidation of 1891, 54 Vict. ch. 55, sec. 132:—

*Held*, that the dropping of these words had not altered the effect of the provision; it must be read as imperative; and therefore the plaintiff, who was engaged as a teacher for a year, but without any written agreement, and was dismissed during the year, could not recover damages for wrongful dismissal.

*Birmingham v. Hungerford* (1869), 19 C.P. 411, and *Young v. Corporation of Leamington* (1882-3), 8 Q.B.D. 579, 8 App. Cas. 517, followed.

Judgment of the County Court of the County of Oxford reversed.

The defendants' conduct having been unmeritorious, they were left to bear their own costs throughout.

THIS was an appeal by the defendants from the judgment of the County Court of the County of Oxford, pronounced on the 3rd July, 1909, after the trial of the action before the acting Judge of that Court with a jury on the 8th June of the same year.

The plaintiff was a school teacher, and alleged that she was employed by the defendants in that capacity for the year 1908, at a salary of \$500, and was during the year wrongfully dismissed; and her claim was for damages for the wrongful dismissal.

The jury found a general verdict for the plaintiff, and assessed her damages at \$50, for which sum, with costs on the Division Court scale, without set-off, judgment was directed to be entered.

It was not disputed that the plaintiff was engaged as she alleged for the year 1908, but the agreement was not reduced to writing, and it was contended by the defendants that it was, therefore, not binding on them, and that the plaintiff's action must therefore fail.

The defendants invoked in support of their contention the provisions of sub-sec. 1 of sec. 81 of the Public Schools Act, 1 Edw. VII. ch. 39, which provides as follows: "(1) All agreements between trustees and teachers shall be in writing, signed by the parties thereto, and shall be sealed with the seal of the corporation."



February 4. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., BRITTON and CLUTE, JJ.

*C. A. Moss*, for the defendants. The case is governed by 1 Edw. VII. ch. 39, sec. 81 (1), by which it provided that all contracts such as the one in question shall be in writing, and under the seal of the school corporation. It is also submitted that the County Court had no jurisdiction to try the action, as under sub-sec. 7 of sec. 81 all matters of difference are to be brought in the Division Court.

*J. L. Ross*, for the plaintiff. This is not an action for salary under sec. 81, but for damages for wrongful dismissal. The section relied on by the defendants is directory only, and not imperative: *McPherson v. Trustees S.S. No. 7 Usborne* (1901), 1 O.L.R. 261, at p. 264. [MEREDITH, C.J.:—That case does not help you much.] It shews that the provision as to the affixing of the seal is merely directory. The notice served upon the plaintiff recognises an engagement, and the evidence shews that she had a verbal contract for a year.

*Moss*, in reply. The plaintiff's case is not laid on a verbal contract. If it had been, it would have been met by the Statute of Frauds.

April 28. The judgment of the Court was delivered by MEREDITH, C.J. (after stating the facts as above):—I have reluctantly come to the conclusion that the contention of the appellants is well-founded, and that the judgment in favour of the respondent must be reversed.

The question was dealt with by the Court of Common Pleas in *Birmingham v. Hungerford* (1869), 19 C.P. 411. The Act then in force was 23 Vict. ch. 49, and the section which corresponds with sub-sec. 1 of sec. 81 of ch. 39, 1 Edw. VII., was sec. 12, and it read: "All agreements between trustees and teachers, to be valid and binding, shall be in writing, signed by the parties thereto, and sealed with the corporate seal . . ." Referring to it, Hagarty, C.J., said, p. 412: "If we attach any meaning to the clause cited we think it must be that a person can only become a common school teacher by agreement under seal, and that any other agreement, verbal or written, would not be an agreement for that purpose with the school corporation;" and it was accordingly held on demurrer that

D. C.

1910

MCMURRAY

v.

E. MISSOURI  
P. S. BOARD.

D. C.  
1910  
McMURRAY  
v.  
E. NISSOURI  
P. S. BOARD.  
Meredith, C.J.

the provisions of the Act for an arbitration in case of a difference between the trustees and a teacher as to the salary of the teacher could not be invoked by the plaintiff, there being no allegation in her pleading of an agreement such as sec. 12 requires. Section 12 has been carried down in the same form, with one exception, through all the consolidations which took place from 1860 to and including 1901.

The one exception is the omission of the words "to be valid and binding," which were dropped in the consolidation of 1891, 54 Vict. ch. 55, sec. 132, and have not appeared in any of the subsequent consolidations.

I do not think that the dropping of these words has altered the effect of the provision, as without such words a similar section of the English Public Health Act, 38 & 39 Vict. ch. 55, sec. 174, has been held (*Young v. Corporation of Leamington* (1882), 8 Q.B.D. 579, affirmed (1883), 8 App. Cas. 517), to be imperative and not directory. That section, so far as its provisions are material to the present inquiry, reads as follows: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely: 1. Every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority." The case was one on an executed contract for services by engineers, and it was held that the absence of the common seal of the corporation in the employment of the plaintiffs was fatal to their right to recover for their services. It was urged without avail by counsel for the plaintiffs that there were no negative words added to the first regulation; that it was not said "shall be sealed with the common seal and not otherwise;" and that, as the third and fourth regulations clearly were only directory, and the second might at least be plausibly argued to be only directory, the first regulation should be construed as also only directory.

As the appeal must be allowed upon this ground, it is unnecessary to consider the objection raised to the jurisdiction of the County Court.

The conduct of the appellants has been unmeritorious. They employed the respondent without an agreement such as the Act requires, for the year 1907, and she served for that year without objection. She was re-engaged for 1908, and entered upon her

duties and continued to perform them till the 30th June of that year, when she was dismissed. For the omission which results in the failure of the respondent's action, the appellants were more to blame than was the respondent, and, in allowing the appeal and directing the dismissal of the action, the appellants may be well left to bear their own costs throughout.

D. C.  
1910  
McMURRAY  
v.  
E. NISSOURI  
P. S. BOARD.  
Meredith, C.J.

[BRITTON, J.]

BEER V. WILLIAMS.

1910  
April 29.

*Devolution of Estates Act—Land Vesting in Heir without Conveyance under sec. 13—Liability for Debts—Action by Judgment Creditor against Heirs—2 Edw. VII. ch. 1, sec. 4—Repeal of 3 W. & M. ch. 14—Bar by Statute of Limitations—Possession under Parol Gift—Acts of Ownership.*

Where there has been a conveyance of land of a deceased person by the executor or administrator, the heir or devisee is free from an action by a creditor of the deceased. Where there has not been a conveyance, but the land has become vested in the heir or devisee under sec. 13 of the Devolution of Estates Act, the land is liable to answer the debts of the deceased person: 2 Edw. VII. ch. 1, sec. 4, and ch. 17, amending the principal Act.

N. H. died on the 24th May, 1899, intestate. Under sec. 13, her land became vested in her heirs on the 24th May, 1900, at which date the statute 3 W. & M. ch. 14 was in force. The statute 2 Edw. VII. ch. 1, by sec. 2, repealed, so far as in force in Ontario, 3 W. & M. ch. 14:—

*Quare*, whether the words of sec. 4 of 2 Edw. VII. ch. 1, "shall become vested," applied to land which had become vested before that Act was passed, and, if not, what was the effect of the repeal of 3 W. & M. ch. 14?

An action was brought by a judgment creditor of N. H., against her heirs-at-law, for a declaration that the plaintiff's debt was a charge upon certain land of which she was alleged to be the owner in fee at the time of her death, and for a sale of the land, etc. The plaintiff did not sue as an execution creditor, nor on behalf of all creditors, and did not ask for administration:—

*Held*, that the action lay.

*Held*, however, upon the evidence, that one of the defendants had, by virtue of a parol gift from N. H., and length of possession, acquired a title to the land under the Statute of Limitations; and upon that ground the action failed.

Acts of ownership depend upon the circumstances, the conditions, and the kind of land. In this case it was bush land, and there was evidence of fencing and payment of taxes.

ACTION against the heirs-at-law of Nancy Hillis, who died on the 24th May, 1899, intestate, for a declaration that a certain debt due to the plaintiff was a charge upon land which had been conveyed to Nancy Hillis, and for a sale of the land to pay the debt. The facts are stated in the judgment.

1910  
BEER  
v.  
WILLIAMS.

February 2. The action was tried before BRITTON, J., without a jury, at Toronto.

*F. E. Hodgins*, K.C., and *F. S. Bastedo*, for the plaintiff.

*D. Burke Simpson*, K.C., for the defendant William Lammiman.

*J. R. Meredith*, for the infant defendants.

No one appeared for the other defendants.

April 29. BRITTON, J.:—William Lammiman senior died in 1865 or thereabouts, leaving a widow and children. William Lammiman, the defendant, was then about four years of age. Nancy Lammiman, the widow of Lammiman senior, married a man named Hillis. Lammiman senior was the owner of the small piece of land in question and other land. On the 10th November, 1883, the heirs-at-law of Lammiman senior conveyed these 12½ acres to the widow, Nancy Hillis. The consideration stated was \$125. It apparently was not then worth more. Nancy Hillis owned another piece of land, 32¼ acres, and on the 17th March, 1896, she gave a mortgage upon it to the plaintiff for \$1,100 and interest. She died on the 24th May, 1899, intestate.

The plaintiff brought an action upon his mortgage, brought the mortgaged land to sale, and, after a very large amount of costs had been incurred in that action, there was a deficiency of \$224.06, to which balance, with interest, the plaintiff claims to be entitled. In that action there was no claim for administration, nothing said about other creditors, if any, but the plaintiff seemed to be content with realising the security he had. Failing to get paid in full, he looked about, and ascertained that his mortgagor at one time owned the 12½ acres in question, and he has brought the present action. He asks for a declaration that his debt is a charge upon this land in the hands of the heirs, and that this land be sold for the payment of his debt. The plaintiff does not sue as a judgment creditor with execution in the hands of the sheriff, and does not sue on behalf of all creditors, and does not ask for an administration order or general administration of the estate of Nancy Hillis, or that any administrator be appointed. No application has been made by any one for administration. There is no question as to the solvency of Nancy Hillis, no other creditors appearing, so far as we heard at the trial.



The plaintiff contends that he has a right to proceed in this way, if the land in question belongs to the estate of the deceased Nancy Hillis.

The defendant William Lammiman pleads as a bar to the action want of administration and that this action is not for administration. The action is brought against the heirs-at-law of Nancy Hillis, not to make them personally liable, but as a proceeding to reach the land in question, which, if it belonged to her, may be treated as an asset in the hands of the heirs for the payment of the debt.

*Gardiner v. Gardiner* (1832), 2 O.S. 554, decided that lands could be reached by action against an administrator or executor. After the law was established by that decision, actions against the heir became infrequent, if not obsolete, as was pointed out in *Rymal v. Ashberry* (1862), 12 C.P. 339, at p. 342; and see *Armour on Devolution*, p. 186.

I do not know of any action, since *Gardiner v. Gardiner*, brought, as is this one, against the heirs, and counsel did not refer me to any reported case. It is, however, apparent that such an action may be brought. The legal position is now, as pointed out by Mr. Armour on pp. 192, 194, and 195, as follows: Where there has been a conveyance of the land by the executor or administrator, the heir or devisee is free from an action at suit of a creditor. Where there has not been a conveyance, but where the land has become vested in a devisee or heir under the 13th section of the Devolution of Estates Act, the heir or devisee shall continue to be liable: R.S.O. 1897, ch. 127, as amended by 2 Edw. VII. ch. 1, sec. 4, and 2 Edw. VII. ch. 17.

A possible doubt may arise as to the correctness of my conclusion, for this reason. Nancy Hillis died on the 24th May, 1899, intestate. Under sec. 13, ch. 127, R.S.O. 1897, the land became vested in the heirs on the 24th May, 1900; the statute 3 W. & M. ch. 14 was then in force. The statute 2 Edw. VII. ch. 1, which, by sec. 4, continued the liability of land of deceased persons for debts of deceased, also, by sec. 2, repealed, as to the Province of Ontario, 3 W. & M. ch. 14. Section 4, ch. 1, 2 Edw. VII., speaks of lands which "shall become" vested. Can that apply to this land, which had become vested? If it cannot, can the plaintiff get on in this action without the aid of 3 W. & M. ch. 14, which is now not in force in Ontario?

Britton, J.

1910

BEER

v.

WILLIAMS.



Britton, J.

1910

BEER

v.

WILLIAMS.

With some hesitation, I think this action will lie if the land has not become the land of the defendant Lammiman by virtue of the Statute of Limitations.

The plaintiff's status here is as a judgment creditor. The defendant Lammiman objected that this has not been proved. The objection was formally raised that the papers in the suit above mentioned were not evidence upon their mere production. It was contended that the mortgage should have been proved, and all the other proceedings, including the sale of the land and the alleged deficiency. I allowed these papers to be put in, subject to the defendant's objection. If the case goes further, the defendant is entitled to the benefit of the objection if I erred in my ruling.

The defendant William Lammiman claims title by possession. His evidence is that in 1885, by reason of his brother-in-law cutting wood on this lot, he complained, and his mother gave the lot to him. The defendant, if born in 1861, would be 24 years of age at that time, and the lot was then bush, seven and a half miles distant from his residence, and of comparatively little value. His statement, therefore, is not improbable. There were no creditors, no one objecting, and this occurred—if it did occur—eleven years before the plaintiff got his mortgage. In 1887 the defendant arranged with a neighbour, Taylor, as to fencing. There is a dispute as to when Taylor actually did any fencing, but he did some, and there is no evidence that he did it in any other way than under an agreement such as the defendant alleged. We are not assisted by the assessment of this lot. It seems to have been assessed to John Hughes, whose connection with it no one appears to know. It was also returned as non-resident land. However, the defendant says he paid taxes to Hughes. That is not unlikely, because it is clear that there are no arrears of taxes against the lot except for the late years of 1907 to 1909, inclusive. The taxes for the years 1901 to 1906 were paid by Lammiman to the county treasurer. He sold some wood, and his evidence is corroborated as to this by Gallagher and Vancamp.

Then we have the evidence of Lammiman's wife. She appeared to be a truthful woman. I accept her story as told. There was reason for the conversation which she alleges took place between her husband and his mother. She says that Mrs. Hillis said she had given the ridge lot to the defendant, and that she would give him all if he would remain at home; that, if he went away, her

last prop would be gone. Under all the circumstances, that seems to me a perfectly credible story. Nothing, however, came of this, and in 1899 the old lady died.

Then there was the delivery of the old deeds, if I believe the evidence, as I do, and the keeping of these deeds by the defendant. The defendant's Christian name was the same as that of his father, and the old lady seemed to think that because the deed was in that name it would answer for the son. No claim is made by the sisters.

Now, acts of ownership depend upon the circumstances, the conditions, etc., and the kind of land. This, as has been said, was bush land, no buildings upon it, a considerable distance from where the defendant lived, and of comparatively little value. It does not appear what the ultimate use of the land would be when the timber is off. It cannot be very good farm land.

The evidence of Gallagher merely reduced the length of time since the fencing was commenced, and also as to the time when Lammiman got wood from the property.

Van Camp said that the defendant's statement in regard to his sisters was, that the land was his—that is to say, the land of the defendant Lammiman. From the questions put by counsel to the defendant, I supposed Van Camp would prove a statement by the defendant that he could not sell without his sisters joining in the conveyance, but that is not what the sisters said, according to Van Camp's evidence; and, according to Van Camp's evidence, the sisters' statement, if they made any, was corroborative of the evidence of the defendant himself.

I quite agree that, according to the authorities, if this case was against Nancy Hillis in her lifetime, and if she averred a want of knowledge of the occupancy or of the acts of ownership by her son, a very different state of things would prevail. Here, if the evidence is accepted, all that the defendant did down to the time of his mother's death was with the complete knowledge of his mother.

When one speaks of the possession being notorious, that means that it must be so public that, in the natural order of things, knowledge of it would be brought home to the owner of the land, so that the owner could take such steps as might be necessary to prevent the occupancy by another ripening into a title by limitation. This is unnecessary here, if the defendant's mother knew what the defendant was doing, and I think she did know it; and, therefore,

Britton, J.

1910

BEER  
v.

WILLIAMS

Britton, J.

1910

BEER

v.

WILLIAMS.

I give effect to the evidence, and think the defendant William Lammiman has acquired a title by possession.

There is not a suspicion of fraud in this matter. Nancy Hillis seems to have been an honest woman. The transaction, as was intended between her and the defendant William Lammiman, ought not at this distance of time to be disturbed.

The action must be dismissed, and with costs.

---

[SUTHERLAND, J.]

1910

RE PRANGLEY AND TOWN OF STRATHROY.

April 30.

*Municipal Corporations—Local Option By-law—Voting on—Method of Taking Vote—Votes of Illiterate Persons and those Physically Incapacitated—Municipal Act, 1903, sec. 171—Neglect of Deputy Returning Officers to Comply with Requirements of—Irregularities—Application of sec. 204.*

Upon an application to quash a local option by-law, upon the ground that the by-law, upon being submitted to the electors, did not receive the necessary majority of votes, it appeared that ten of the persons who voted were unable to read or write or were otherwise incapacitated from marking their ballot papers, and that the deputy returning officers marked ballot papers for them, without requiring them to make declarations of inability to read or physical incapacity, and in the absence of the agents appointed for and against the by-law, and without making the proper entries in the poll-books; in these respects failing to comply with the provisions of sec. 171 of the Municipal Act, 1903:—

*Held*, that the vote of one of these persons should be disallowed, because it was clear upon the evidence that the deputy returning officer marked the ballot as he (the officer) pleased, the voter giving no direction.

As to three of the votes, they should not, upon the evidence, be disallowed.

As to the six remaining, it appeared that each of the voters had a full and fair opportunity to cast his ballot; that the six ballots were marked by the deputy returning officers in good faith and in accordance with the directions of the voters; that no objection was taken by the agents to the method adopted of taking the votes, but that that method was acquiesced in by every one present:—

*Held*, that the non-compliance with the provisions of the Act in regard to these six votes should not invalidate the by-law, the voting having been conducted in accordance with the principles of the Act, and the non-compliance not affecting the result: Municipal Act, sec. 204.

Head-note in *In re Duncan and Town of Midland* (1908), 16 O.L.R. 132, corrected.

*Re Young and Township of Binbrook* (1899), 31 O.R. 108, followed.

In the case of one of the ten voters a person accompanied her and was present with her in the polling-booth in circumstances which enabled that person to ascertain how the voter's ballot was being marked:—

*Held*, that that fact did not, in the circumstances, affect the result.

The motion to quash the by-law was dismissed without costs, the irregularities of the deputy returning officers, the appointees of the municipality, being such as to provoke suspicion and warrant the motion.

APPLICATION to quash by-law No. 642 of the Corporation of the Town of Strathroy, being a by-law to prohibit the sale by retail of spirituous, fermented, or other manufactured liquors in the municipality of the town of Strathroy. The vote was taken on the by-law on the 3rd January, 1910, and it was given its final reading on the 7th March following. The facts are stated in the judgment.

1910  
RE  
PRANGLEY  
AND  
TOWN OF  
STRATHROY.

April 23. The application was heard by SUTHERLAND, J., at the London Weekly Court.

*J. C. Judd*, K.C., for the applicant.

*T. G. Mcredith*, K.C., for the respondents.

April 30. SUTHERLAND, J.:—No objection is urged against the form of the by-law. The declaration required to be made by the returning officer as to the passage of the by-law was so made on the 4th January, 1910, and the vote as declared by him was 477 for and 309 against the by-law. Subsequently, on a scrutiny before the Senior Judge of the County Court of Middlesex, 6 of the votes polled for the by-law were struck off and an additional one added against the by-law, leaving the vote standing at present as follows: 471 for and 310 against. The result of this is, that the by-law is carried by a majority of two and two-fifths above the three-fifths of the votes cast. The margin, therefore, in favour of the by-law is so narrow that, if 6 more votes were struck off, it would be defeated.

Upon this application to quash, 10 votes are attacked: in poll No. 1, the votes of Charles Demarry, William Wray, Samuel Carson, Rhoda Calcott, and Margaret Harker; in poll No. 2, the vote of William Ellis; in poll No. 3, the votes of Albert Plaxton, Jeanette McKellar, and Annie Cook; and in poll No. 6, the vote of Arthur Cushman.

The grounds of attack as disclosed in the notice of motion are as follows:—

“(1) That the said persons were unable to read or write and otherwise incapacitated by blindness or other physical cause from marking their ballot papers, and that such ballot papers were marked by the deputy returning officer in each case without any of the said persons making a declaration of inability to read or physical incapacity, and in the absence and not in the presence of



Sutherland, J.

1910

RE

PRANGLEY

AND

TOWN OF

STRATHROY.

the agents appointed for and against the said by-law, and that such ballot papers were illegal, but were put in the ballot box and counted.

“(2) That the ballots and votes mentioned in paragraph 1 were not the ballots and votes of the persons named in the said paragraph, but were really the ballots and votes of the respective deputy returning officers.”

The material which I am asked to consider consists of two affidavits made by each of the four deputy returning officers, namely: Edward A. Whyte, who officiated at poll No. 1; Thomas Luscombe, at poll No. 2; Alexander Leitch, at poll No. 3; and John W. Gibson, at poll No. 4; and the examinations of each of the said deputy returning officers, with the exception of Edward A. Whyte, upon their affidavits; the affidavits of four of the said voters, namely, Margaret Harker, William Ellis, Jeanette McKellar, and Annie Cook; and the examinations of the said Margaret Harker, William Ellis, and Jeanette McKellar on their said affidavits; and the affidavit of one Duncan McKellar, a scrutineer, on the part of those opposed to the by-law at the said election.

Section 171 of the Municipal Act, 3 Edw. VII. ch. 19 (O.), is the section dealing with the proceedings to be taken in case of incapacity of voters to mark their ballot papers. It is as follows:—

“In the case of an application by a person claiming to be entitled to vote, who is incapacitated by blindness or other physical cause from marking his ballot paper, or in the case of a person claiming to be entitled to vote who makes a declaration that he is unable to read . . . the proceedings shall be as follows:

“1. The deputy returning officer shall, in the presence of the agents of the candidates, cause the vote of such person to be marked on the ballot paper in the manner directed by such person, and shall place the ballot paper in the ballot box.

“2. The deputy returning officer shall state or cause to be stated in the poll-book, by an entry opposite the name of such person in the proper column of the poll-book, that the vote of such person is marked in pursuance of this section, and the reason why it is so marked.

“3. The declaration aforesaid may be in the form of schedule E to this Act, and shall at the time of the polling be made by the person claiming to be entitled to vote, before the deputy returning



officer, who shall attest the same as nearly as may be according to the form given in schedule F to this Act; and the said declaration shall be given to the deputy returning officer at the time of voting."

The form of schedule E to the Act is as follows:—

"I, A.B., of \_\_\_\_\_, being numbered \_\_\_\_\_ on the voters' list, for polling subdivision No. \_\_\_\_\_, in the city (*or as the case may be*) of \_\_\_\_\_ and county of \_\_\_\_\_, being a legally qualified elector for the said city (*or as the case may be*) of \_\_\_\_\_, do hereby declare that I am unable to read (*or that I am from physical incapacity unable to mark a voting paper, or that I object on religious grounds to mark a ballot paper as the case may be*).

(A.B., His × mark.)

Dated this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 19 \_\_\_\_."

It is apparent from the material, and was admitted in argument, that no declaration as to incapacity from blindness or other physical cause, or inability to read, was made by any of the 10 voters in question; that in some of the cases the ballot papers were not marked in the presence of the agents of the parties supporting and opposing the by-law; and that no entries opposite the names of the said persons in the proper column of the poll-book were made.

Counsel for the motion contends that non-compliance with the said prescribed formalities renders the votes void, while the opposing counsel argues that under sec. 204 of the said Act, which is as follows: "No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election;" the irregularities are curable upon the facts in evidence.

There can be no question but that the deputy returning officers were very careless in their mode of dealing with the votes in question. No attention apparently was paid by them to the express provisions of the statute, and in the case of one of them there is the plain admission from him, since the election, under oath, that he thought if a voter who had gone into the compartment to record his vote,

Sutherland, J.

1910

RE

PRANGLEY  
AND

TOWN OF  
STRATHROY.

Sutherland, J.  
1910  
RE  
PRANGLEY  
AND  
TOWN OF  
STRATHROY.

and had been followed there by the returning officer, told the latter to vote as he liked, he was justified in marking the voter's ballot according to his own views and opinions. But the carelessness and indiscretion of these officers does not end here. After having made affidavits which the applicant to quash the by-law intended to use in support of the application, at least three out of the four deputy returning officers subsequently made, at the instance of those opposed to the motion, other affidavits, which, as it seems to me, in material respects, are contradictory of their first affidavits.

It is to be noted that in each case a poll-clerk was not provided to assist the deputy returning officer, and it is apparent that more than once the ballot-box was left on the table by the deputy returning officer while he went into the compartment with a voter to mark his ballot. Whether this failure to provide poll-clerks arises from parsimony or otherwise, it is a course of procedure contrary to the Act, and should not be countenanced.

Mr. Whyte was the deputy returning officer at poll No. 1. In his first affidavit, sworn on the 17th March, 1910, he makes this statement: "I asked her (the said Margaret Harker) how she wanted to vote, and she did not reply, but Mrs. Carruthers spoke to her, and afterwards told me how to mark the said ballot. I did not hear what Mrs. Harker said to Mrs. Carruthers."

In his second affidavit, made on the 16th April, 1910, he says: "The ballots of the voters Charles Demarry, William Wray, Samuel Carson, Rhoda Calcott, which were marked by me for them respectively as stated in my said affidavit, were so marked by me in good faith, and in each case the ballot was marked under, and in accordance with, the directions of the voter so voting."

In his first affidavit he said, with reference to the votes of the said four named persons, that "I went with him (or her) behind the screen and I marked the ballot respecting the said by-law which I had given him (or her). Neither of the scrutineers or agents for or against the said by-law was present at the marking of the said ballot, and it was not marked in their presence."

Whyte was not examined on his affidavits.

Thomas Luscombe was the deputy returning officer at poll No. 2. In his affidavit, sworn on the 17th March, 1910, paragraph 4, he makes this statement: "I asked the said William Ellis how he wanted me to mark his ballot, and he replied that he could not

tell me, and he said to me, 'vote as you like,' and I voted as I liked, because he was quite unable to do so." In a second affidavit, sworn on the 30th March, 1910, he makes this statement: "The ballot of the voter William Ellis, which was marked by me for him as stated in my said affidavit, was so marked by me in good faith, and the ballot was marked under and in accordance with the direction of the said William Ellis."

Luscombe was examined on these affidavits. I quote extracts from the examination, and, as the questions are not numbered, I refer to the pages.

Page 2: "Q. Was it read over to you? A. Yes, Mr. Toothe read it over, but I would not understand what he said correctly. Mr. Lindsay said it was something the same as the last one. It was a pretty cold day on the top of a load of manure. Q. Where did you sign it? A. On top of the load of manure; I never got off."

Page 4: "Q. Then you did not mark the ballot in accordance with the direction of William Ellis? A. I did not; he gave no direction at all, not the slightest."

Page 6: "Q. What did he say to you? A. He said he did not understand anything about it. Q. About what? A. About the ballot. Q. Then what? A. Then I explained it to him, and told him there were lots of people waiting, and he had better mark his ballots as quickly as he could, and he said, 'you mark them.' Q. What did you do? A. I marked them. . . . Q. You said there, in answer to the question that was put to you about marking his ballot. Judge Macbeth asked you the question, 'Do you mean he did not remember how he wanted to vote?' And your answer to that was, 'He could not tell me, he said, vote as you like.' That is correct? A. Yes. Q. You voted as you liked, and your reply is, 'I voted as I liked, he was quite unable, your Honour?' A. Quite unable."

Page 7: "Q. He told you to vote as you liked? A. Yes. Q. You did vote as you liked? A. Yes; there is one thing I might say—he had voted for the library by-law before I came in. Q. And he did vote for the library by-law? A. Yes. . . . Q. And then he says he told you you could mark the councillors by-law as you liked? A. Exactly, 'mark them as you like.' Q. Did that refer to the local option and reeve as well? A. It referred to the whole thing."

Sutherland, J.

1910

RE  
PRANGLEY  
AND  
TOWN OF  
STRATHROY.

Sutherland, J.

1910

RE

PRANGLEY

AND

TOWN OF  
STRATHROY.

Page 9: "Q. You were really voting there, they were really your ballots? A. Yes."

Page 12: "Q. His reply was what? A. Mark them as you like. Q. Didn't you then tell him you could not do that? A. No, I did not. Q. Why? A. Because it is your duty to do it if he can't. Q. He must tell you how he wants to vote? A. The law says it is my duty to mark ballots if he cannot. Q. In accordance with his wish? A. He did not wish any way at all. Q. He allowed you to mark the ballots? A. Just as I liked."

Page 13: "Q. You marked them just as you liked? A. Yes. Q. Without asking him how he wanted to vote? A. Certainly; when he insisted on me marking them he would have stayed till this time, and would not have marked them. Q. Paragraph 2 of your affidavit, that states that you marked the ballots in accordance with his directions, is not true? A. No; I did not understand it. . . . Q. You say, in paragraph 6, 'In taking over the vote of the said Ellis, as I did, I believe the result of the poll was not in any way affected'? A. I do not understand what you mean; it must make a difference to the election which way he voted . . ."

Page 14: "Q. Of course it does? A. How could I make such a statement as that? . . . Q. Were the scrutineers behind the screen at the time you marked your ballot? A. No. Q. They did not see how you marked this local option ballot? A. No; no one saw but Mr. Ellis. Q. Did he see how you marked it? A. I cannot tell you, I do not think so, I do not think he knew. . . ."

Page 15: "Q. You did not know, in marking them, whether he approved of them or not? A. I did not."

Alexander L. Leitch was the deputy returning officer at poll No. 3. In his affidavit, sworn upon the 17th March, 1910, in paragraph 4, he makes this statement, with reference to the ballot of Albert Plaxton: "I am unable to say whether the said ballot was marked behind the screen in the absence of the scrutineer, or openly upon the table in the polling booth in the presence of the scrutineers." And in paragraphs 5 and 6, with reference to the votes of Jeanette McKellar and Annie Cook: "I went with her behind the screen and marked the ballot which I had given her respecting the said by-law. Neither of the scrutineers or agents for or against the



said by-law was present at the marking of the said ballot, and it was not marked in their presence."

In his second affidavit he says: "The ballot papers of the said Albert Plaxton and Annie Cook were marked by me as directed by the said Albert Plaxton and Annie Cook respectively, in the presence of the scrutineers or agents who were in attendance at the said polling booth, and in the case of the said Mrs. Malcolm McKellar I requested the said scrutineers or agents to attend and see me mark the ballot of the said Mrs. Malcolm McKellar, but they did not comply with my request."

He was examined on these affidavits as follows:—

Page 42: "Q. What was the trouble with Albert Plaxton? A. His sight, if I remember right, is what seemed to be imperfect. I think that was what it was. . . ."

Page 43: "Q. The next thing you spoke to the scrutineers as to what? A. As to the taking of his affidavit or declaration. Q. They said it was not necessary? A. They said it was not necessary."

Page 44: "A. I asked them to come up and see me mark the ballot, and they said it was not necessary because they had confidence in me, I would mark the ballot according to request. . . . Q. He could not see how you were marking the ballot? (This reference is to Plaxton, the voter). A. I do not know whether he could. Q. That was the reason he gave? A. Yes. Q. You had no reason to doubt it? A. No."

Referring to the ballot of Margaret McKellar, at p. 45, he says: "Q. At all events where was her ballot marked? A. Behind the screen. Q. You went with her? A. Yes. . . . Q. You marked the ballot papers? A. Yes. Q. Including the local option ballot? A. Yes. . . . Q. There were no scrutineers there behind the screen? A. No. . . . Q. What was the trouble with Mrs. Cook? A. Her sight was impaired, and old age. Q. Could she see? A. Not very well; I understood she complained that she could not. . . . Q. Where was her ballot marked? A. On the table. Q. Who were in at the time Mrs. Cook's ballot was marked? A. The scrutineers and Mr. Mullen. . . ."

Page 47: "Q. Did the scrutineers see you mark her ballot? A. They could have seen me. Q. They did not get off their seats? A. No."

John William Gibson was deputy returning officer at poll No. 6.

Sutherland, J.

1910

RE  
PRANGLEY  
AND  
TOWN OF  
STRATHROY.

Sutherland, J.  
1910  
RE  
PRANGLEY  
AND  
TOWN OF  
STRATHROY.

He made two affidavits, sworn respectively on the 17th and 26th days of March, 1910. He was examined on these affidavits. At page 52, referring to the ballot of Arthur Cushman, he says: "Q. Do you know whether he could read or write? A. No, I do not know. Q. He asked you to mark his ballot for him? A. Yes, he asked me to explain, and then some scrutineers suggested that he come back here, and I marked them for him so they could see that he voted as he wanted to."

Then as to the affidavits of the voters and their examinations thereon. Margaret Harker made an affidavit on the 30th March, 1910, in which she states that she could both read and write, and adds: "I was so exhausted that I could not, at that time, mark the ballots. The said Edward Anthony Whyte thereupon offered to mark my ballot for me, and I directed him how he was to mark my ballot with respect to the above mentioned by-law relating to local option, and the said Edward Anthony Whyte marked my ballot as so directed by me." Then in paragraph 3 of her affidavit she contradicts Edward A. Whyte in the following way: "I say that the said Edward Anthony Whyte is mistaken in saying that I did not tell him how I wished my ballot marked, but that I told Mrs. Carruthers, who was with me at the time. I distinctly told the said Edward Anthony Whyte how to mark my said ballot, and he, as I have said, did mark it for me as by me directed." She was examined upon this affidavit, and says, at p. 15: "Q. What is your age? A. I am 94 years and 6 months. I was born in the year 1815." Referring to the Mrs. Carruthers who was with her, p. 18: "Q. What did she say to you? A. She told me that Mr. Whyte could do my marking. I always marked my own votes before, but I sat down there and I needed a little rest and so I sat still. . . ."

Page 19: "Q. Did Mrs. Carruthers say anything to you then? A. No, not a word; she had never been in such a place before, and she did not say anything to me nor me to her, nor to anybody, but asked me how I wanted to vote. . . . Q. You know what Mr. Whyte says Mrs. Carruthers asked you, who you wanted to vote for. Is that true? Mr. Whyte says that Mrs. Carruthers asked you who you wanted to vote for? A. I would not say. . . . Q. Mr. Whyte says you told Mrs. Carruthers, but he did not hear what you said to Mrs. Carruthers. Would that be right? A. Well, I suppose—I do not know, I cannot say. Q. Were you telling Mrs. Carruthers? A. She was right standing beside me."

Sutherland, J.

1910

RE

PRANGLEY

AND

TOWN OF  
STRATHROY.

Page 20: "Q. Did you tell her what you wanted to vote for? A. She was there; I do not know whether I told her or not. I spoke that anybody could hear me. . . . Q. You saw Mr. Whyte marking on the papers? A. I did. Q. Had Mrs. Carruthers spoken to him just before that? A. I do not remember. Q. Could you tell how he was marking his papers? A. No. Q. Then you do not know how he marked your papers? A. Well, no, I could not take oath. Q. Could you tell how he was marking your papers? A. No. Q. You do not know whether he marked these papers the way you wanted them marked or not? A. No, certainly I could not."

Page 21: "Q. I would like to make clear, if I can, whether you remember Mrs. Carruthers asking you how you wanted to vote? (Mr. Fisher objects to question. Answer taken subject to objection.) A. I could not tell, to tell the real truth. Q. You could not tell me whether you told her how you wanted to vote? A. Of course she heard me speaking; I was either telling her or him, I do not know which. Q. By him you mean Mr. Whyte? A. Yes. Q. You do not know which? A. I expect it was him because he had the pencil in his hand. Q. You do not know whether Mr. Whyte heard you? A. No, I could not say. Q. Did Mrs. Carruthers speak to him just before he marked the papers? A. Not that I remember. Q. You were pretty well exhausted that morning? A. I was a little fatigued; I had never been out for some weeks; I had been sick but I had got strong. That was the first outing. Q. You could not mark your ballot that morning? A. I could; I went with that intention. Q. Why didn't you? A. That is what I blamed myself for. Q. You do not blame Mrs. Carruthers? A. No, I blame nobody but myself. She told me Mr. Whyte could mark my ballot. Well, I thought he was a gentleman to do what was right in the position he was in, and I voted for councillors so many years."

Page 24: "Q. Did you say then in his presence and in the presence of Mrs. Carruthers how you wanted to vote? A. I did, of course I did. Q. He marked the ballots, but as to how he marked them you do not know? A. No, I could not tell because he did not let me see the paper, but just doubled up the paper and put it in."

Duncan McKellar, the scrutineer above referred to, states in his affidavit, sworn on the 21st April, 1910, as follows: "I was present

Sutherland, J.

1910

RE

PRANGLEY

AND

TOWN OF  
STRATHROY.

when Margaret Harker entered the polling-booth for the purpose of voting. She was accompanied by a Mrs. Carruthers, and was so old and exhausted and infirm that she appeared to be unable to mark her ballot. I heard the deputy returning officer ask her (the said Margaret Harker) how she wanted to vote on the local option by-law. She made no reply to the deputy returning officer's question. Mrs. Carruthers, who sat right next to her, then spoke to her, and she (the said Margaret Harker) made some reply to her, which I did not hear, and immediately thereafter Mrs. Carruthers told the deputy returning officer how the ballot of the said Mrs. Margaret Harker was to be marked, and the ballot was then marked by the deputy returning officer, on the table in the polling-booth, openly, in the presence of Mrs. Harker, Mrs. Carruthers, the two scrutineers, and the constable."

William Ellis also made an affidavit on the 30th March, 1910, in which he makes the following statement in paragraph 2, referring to the conversation with the deputy returning officer: "And also told him how I wished to vote in respect of the above mentioned by-law relating to local option. With regard to the other names appearing upon the municipal ballot, I told the said Thomas Luscombe that I did not know the other persons, and that he, the said Luscombe, could mark the remaining ballots for whom he liked. I say positively that, on the day and at the time mentioned in the next preceding paragraph of this my affidavit, the said Thomas Luscombe marked my ballot in respect of the above mentioned by-law relating to local option, as I directed him, and also marked my ballot for the name of the candidate whom I desired to vote for, as I have above mentioned. I can both read and write, and saw my said ballots so marked for me by the said Thomas Luscombe."

Ellis was also examined upon his affidavit, and at p. 25, referring to the said affidavit, says: "Q. He got you to sign it? A. Yes. Q. Did you hear what was in the paper? A. No. Q. Didn't he read it over to you? A. I don't remember; I am telling you the truth; I cannot remember a thing five minutes after I hear it. Q. Did you know at the time what was in the paper? A. No, I knew it was concerning this election. . . . Q. Did you sign the paper there? A. Yes; he asked me if I could sign my name, and I said 'yes,' and I took the pen and signed my name, and he said it was all right."



Page 28: "Q. Did you call Mr. Luscombe in there? A. I asked him; he says, 'let me sign your ballots,' and I told him what I wanted."

Page 29: "Q. Then you did not think he was marking any local option for you? A. No, not for local option. Q. You thought you had marked the local option by-law before he came in? A. Yes, I thought I had."

Page 30: "Q. Did you know what you were voting on that day? A. Certainly. Q. What were you voting for that day, reeve and deputy reeve? A. Yes. Q. Council? A. No, I gave him the privilege of what he liked, voting for whom he liked, for the council. . . . Q. The local option you thought he had marked it for you? A. I thought he had, may be he hadn't. . . . Q. Do you know how to mark the ballots? A. No. Q. You could not see how he marked them? A. No."

Page 31: "Q. How old a man are you? A. I think if I live I will be 76 or 75 years old."

Page 32: "Q. What ballot was that you thought you had voted on? A. I just thought I had voted on local option. Q. Did you believe you had? A. I would not like to swear that I had."

And referring to the affidavit, p. 33: "Q. Did they read over the paper to you before you put your name to it? A. Not that I know of; I do not remember. Q. They may have done so, but you do not remember? A. They may have."

Page 34: "Q. Here is what you say in your affidavit, paragraph 3, 'I state positively that on the day and at the time mentioned in the next preceding paragraph of this my affidavit the said Thomas Luscombe marked my ballot in respect of the above mentioned by-law relating to local option as I directed him.' A. Yes, that is true. . . . Q. And marked your local option ballot? A. I do not know. . . . Q. I mean the whisky ballot? A. I positively do not know. Q. You do not know whether you marked it or not? A. Whether it was me marked it or him, I know I had the pen in my hands and made one cross for local option; I thought I did, but I would not positively say that I did."

Page 35: "Q. If you did not, did Mr. Luscombe do it for you? A. Not that I know of. Q. Did you direct him to do it for you? A. I could not tell you whether I told him to do it or not. Q. There between you and Luscombe did you vote for local option? A. Well,

Sutherland, J.

1910

RE

PRANGLEY

AND

TOWN OF  
STRATHROY.

Sutherland, J.  
 1910  
 RE  
 PRANGLEY  
 AND  
 TOWN OF  
 STRATHROY.

I thought I did. Q. Your memory is poor and you do not remember? A. I have a poor memory. Q. Did you go up to the polling-booth that morning to vote for local option or against it? A. I went to vote for it. Q. Mr. Luscombe was the only man who was there at the time he was marking your ballot? A. I would not say that. Q. Behind the screen? A. Yes. Q. Anybody else behind the screen? A. Nobody else."

Jeanette McKellar made an affidavit on the 30th March, 1910, in which she states that she can both read and write, but was unable by reason of nervousness to mark her ballot. She also adds, paragraph 3: "I say that the said Alexander Lachlin Leitch, after having explained the ballots to me, marked my ballot in respect of the above mentioned by-law relating to local option, and the said Alexander Lachlin Leitch did in my presence so mark my said ballot as directed by me." Jeanette McKellar was also examined on her affidavit, and says:—

Page 39: "Q. Mr. Leitch did not hand you the ballot papers? A. No. Q. He took them with him behind the screen, and you went with him? A. Yes. Q. When you got behind the screen, what occurred? A. He took a chair and sat down, and of course shewed me the ballots, and asked me how I wanted them marked, and I told him and he marked them. Q. Did you read the ballots yourself? A. Of course I did. Q. You are sure of that? A. Why, yes, I knew what the man put there. Q. Did you read the ballots yourself? A. Yes, of course I did. . . . Q. Why didn't you take the pencil and ask him to shew you the way? A. He never offered it to me."

Page 40: "Q. What was done with the ballot papers? A. Mr. Leitch took them with him; I do not know what he did with them. . . . Q. You were present when Mr. Leitch directed you to mark your ballot for local option? A. Yes."

Page 41: "Q. Did he mark your local option by-law for you in accordance with your wish? A. Yes. (This should read, no doubt, "ballot" instead of "by-law.")"

Annie Cook made an affidavit on the 31st March, 1910, in which she says that "the said Alexander Lachlin Leitch offered to mark my ballot for me, and, both scrutineers consenting, the said Alexander Lachlin Leitch did mark my ballot in respect of the above mentioned by-law relating to local option, as by me directed.

Both scrutineers were present, and saw him mark my ballot." She was not examined upon her affidavit.

There is no doubt that matters seem to have been carried on by the deputy returning officers in respect of the ballots complained of in a very irregular way; but the questions to be considered are: (1) were the matters omitted to be done by them matters which, under the statute, it was obligatory to do before the voters could properly cast their ballots; or (2) are they such irregularities as can be remedied under sec. 204, if "the election was conducted in accordance with the principles laid down in the Act, and such non-compliance, mistake or irregularity did not affect the result of the election."

Let me deal shortly with the ten voters as follows:—

Demarry. The only evidence is that of Whyte, the deputy returning officer. It is plain from his affidavits that the scrutineers were not present when the ballot was marked by the deputy returning officer for the voter; that no declaration was taken as to the voter's illiteracy; nor were the other formalities required observed. The same state of things is shewn to have occurred so far as the votes of William Wray, Samuel Carson, and Rhoda Calcott are concerned. These persons did not make affidavits, and were not examined. It would have been more satisfactory if they had been.

Then as to the vote of Margaret Harker. On the evidence it is somewhat in doubt whether she did or did not direct the deputy returning officer how she wanted to vote, or whether any direction that was given was not so given by Mrs. Carruthers. It is clear, of course, upon her own shewing, that she wished to vote for the by-law, and that the ballot was marked according to her direction, and, unless the irregularities complained of are fatal, this should weigh in considering whether her vote should or should not be struck out. I am inclined, with hesitation, to allow her vote.

As to the vote of William Ellis, I think it clear upon the evidence that this vote should be disallowed. There is the plain statement in the first affidavit of the deputy returning officer that he marked the ballot as he liked. Upon the whole evidence, I am satisfied that that is what occurred.

As to the vote of Albert Plaxton, his ballot was dealt with very

Sutherland, J.

1910

RE  
PRANGLEY  
AND  
TOWN OF  
STRATHROY.

Sutherland, J.

1910

RE  
PRANGLEY  
AND  
TOWN OF  
STRATHROY.

much in the same way as those of Demarry, Wray, Carson, and Calcott. He makes no affidavit, nor is he examined.

There are discrepancies in the affidavits made by Leitch as to this vote which have been already referred to.

As to her ballot, Margaret McKellar corroborates Leitch in the statement that he marked it as she directed him to do. I think, perhaps, this ballot should also be allowed.

As to the ballot of Emma Cook, there are the same discrepancies in the affidavit of Leitch as with reference to Plaxton's vote. She, however, corroborates him about her ballot being marked as she directed him. I think her ballot should also be allowed.

As to the vote of Arthur Cushman, it stands upon the affidavits of Gibson, and his affidavits do not contain any contradictory statements.

I have thus concluded to disallow the vote of Ellis and to allow the votes of Margaret Harker, Jeanette McKellar, and Emma Cook. This leaves the six votes of Demarry, Wray, Carson, Rhoda Calcott, Albert Plaxton, and Arthur Cushman, to be disposed of.

Now, what are the important considerations in determining, under the Act, whether one should or should not allow these votes under the circumstances disclosed in evidence?

They are, first, had the voters a full and fair opportunity to cast their votes; was the secrecy of the ballot reasonably assured; and was the result of the election affected by anything which was irregularly done?

As to the first point, it is clear that each of the voters in question had a full and fair opportunity to cast his ballot. It is true that, owing to their alleged illiteracy or physical incapacity, the law had laid down special regulations as to the way in which these ballots should be cast, and which, in the circumstances, were not properly observed.

But what was the real result? Counsel for the applicant laid much stress upon the case of *In re Duncan and Town of Midland* (1908), 16 O.L.R. 132, in support of the proposition that the formalities in the case of illiterate and physically incapacitated voters prescribed by the Act, and not complied with, are pre-requisites to the voting in such cases, and the votes must consequently be thrown out. If one looks at the head-note at p. 133, clause 8, namely, "The declaration of inability to read or physical incapacity



to mark the ballot is a pre-requisite to open voting, and its absence invalidates the vote, even though it is done with the consent of the scrutineers for and against the by-law," one might think the contention fully justified. But a reading of the whole case does not give full warrant to the head-note. The main reference to the matter in the case is found at p. 147, in the judgment of Riddell, J., which is as follows:—

"Then it is said that in public school division No. 1 'some half-a-dozen voters gave open votes; and in no such case was a declaration of inability to read or physical incapacity for the marking of the ballot made by the voter.' This is explained by the deputy returning officer as having been done by consent of the scrutineers for and against the by-law; and what happened was that several persons who were unable to read had their ballot marked for them behind the screen, in the presence of both scrutineers. This was wrong; it is only those who make a declaration that they are unable to read who are entitled to have their votes cast in the manner mentioned: sec. 171. Some half-a-dozen are said to have voted in the same way in No. 3. If the number of persons thus voting had been large, it might be necessary to consider how far this defect was cured by sec. 204, but not more than a dozen are claimed to have voted in this way. The vote was in all 711.

"For the by-law . . . . . 477

"Against . . . . . 234

---

711

"To destroy the statutory majority 126 votes must be struck out, thus:

"For the by-law . . . . . 477

"Struck out . . . . . 126

---

351

"Against . . . . . 234

---

"Total valid votes . . . . . 585

"Three-fifths of 585 . . . . . 351

"See *Re Armour and Township of Onondaga* (1907), 14 O.L.R.

Sutherland, J.

1910

RE

PRANGLEY

AND

TOWN OF  
STRATHROY.

Sutherland, J.

1910

RE

PRANGLEY

AND

TOWN OF  
STRATHROY.

606, as to the proper method of calculating the effect of striking off votes.

"Thus it appears unnecessary to consider the effect of sec. 204."

That case only goes the length of pointing out the impropriety of the omissions to follow the provisions of the Act, but does not expressly hold whether or not the irregularities are curable under sec. 204.

I am inclined to think that, under the circumstances disclosed in this case, they are curable. I cannot, on the facts disclosed, see that they affected the result. At all events, I have come to that conclusion, though with some little hesitation, I confess.

The present case is not like, for example, the case of *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317, where the conditions as to voting were so generally loose and irregular, as is pointed out and referred to with so much and such just censure by Anglin, J., at p. 330, and Riddell, J., at pp. 340, 341, 342.

I think the reasonable rule I should seek to apply in this case is well expressed by Street, J., in *Re Young and Township of Binbrook* (1899), 31 O.R. 108, at p. 111: "I think as a general rule that an election should be held to have been conducted in accordance with the principles laid down in the Act, when the directions of the Act have not been intentionally violated, and when there is no ground for believing that the unintentional violation of them has affected the result." And in the case of *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488, at p. 502, in dealing with the particular facts in that case, Mulock, C.J., says: "In the present case there is nothing to shew or even to suggest any intentional violation of the directions of the Act. Nor is there any reason for believing that any disregard of the statutable formalities called for by the Act affected the result. There is no evidence to shew that a single elector was prevented from recording his vote or that the return was not made in strict accordance with the voting."

While the applicant's counsel has pressed his objections as strongly as possible, he is not able to attack, and does not pretend to do so, the *bona fides* of any of the four deputy returning officers in question. These swear that the 6 ballots now being dealt with were marked by them in good faith, and in each case under and in accordance with the directions of the voter; that no objection was taken by the scrutineers who appeared against the by-law to the

method adopted by them of taking the votes in question, but the said method of taking the votes was acquiesced in by every one present in the polling-booth; that they acted absolutely in good faith in taking the votes of the voters; and that in taking the votes of said voters as they did, the result of the poll was not in any way affected.

Under these circumstances, I have come to the conclusion that the 6 votes in question should also be allowed.

It may be said, but what about the question of the secrecy of the ballot? As to this, if the formalities as to taking the declarations had been observed, then the deputy returning officers and scrutineers would have seen how the ballots were marked. They either did see how they were marked or could have done so in the cases in question. They apparently acquiesced in the course taken. They were all sworn to secrecy. While it is true that in one case Mrs. Carruthers was present under circumstances which enabled her to ascertain how a particular ballot was being marked, I cannot find that that fact, under the circumstances, affected the result in any way.

I must, therefore, hold that the motion to quash the by-law fails. I do not think, however, it is a case for costs against the applicant. The irregularities of the deputy returning officers, the appointees of the municipality, were such as to provoke suspicion, and warrant the action taken.

The motion will be dismissed without costs.

Sutherland, J.

1910

Re

PRANGLEY

AND

TOWN OF  
STRATHROY.

## [DIVISIONAL COURT.]

D. C.

1910

April 30.

NEWMAN V. GRAND TRUNK R.W. Co.

*Railway—Carriage of Goods—Claim for Detention—Failure to Give Notice—Contract—Condition—Misprint—"Or"—"Are"—Approval of Board of Railway Commissioners.*

*Held*, affirming the judgment of TEETZEL, J., 20 O.L.R. 285, in an action for damages for breach of a contract for the carriage of goods, that the word "are" should be substituted for "or" in the condition on the back of the shipping bill—in the form approved by the Board of Railway Commissioners—and, the contract being thereby rendered intelligible, and the plaintiff, not having complied with the requirements of the condition, that the defendants were relieved from the consequences of the negligence found against them.

APPEAL by the plaintiff from the judgment of TEETZEL, J., 20 O.L.R. 285, dismissing the action, which was brought to recover damages for breach of a contract for the carriage of goods from Ridgeway to Montreal by reason of failure to deliver the goods within a reasonable time. The trial Judge found that the defendants were guilty of negligence, but held that they were relieved from the consequences by the failure of the plaintiff to give notice in writing, as required by a condition printed on the back of the shipping bill.

April 8. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*H. D. Smith*, for the plaintiff. The trial Judge was wrong in finding that the bill of lading should be construed so as to substitute the word "are" for "or," thereby defeating the plaintiff's claim to redress for the defendants' negligence. Clause 12 of the bill of lading as passed by the Railway Commissioners has the same clause, exactly, as was relied upon by the defendants at the trial to defeat the plaintiff's claim. That clause is meaningless. If the clause is to be altered by the striking out of a word and the addition of any other in its place, then that is not the bill of lading passed by the Railway Commissioners. The clause would, therefore, be an unjust clause.

*W. E. Foster*, for the defendants. With the words "or delivered" given their literal or grammatical interpretation the language of the condition is entirely meaningless. The plain in-



tention was that notice must be given 36 hours after delivery, and "or" was a misprint for "are."

April 30. FALCONBRIDGE, C.J.:—Through an obvious mistake, the word "or" appears instead of "are" in the last line of clause 12 of the terms and conditions which are printed on the back of the shipping bill. In this form it received the approval of the Board of Railway Commissioners for Canada, and the mistake has been perpetuated in the forms used by these defendants.

The plaintiff now asks us to declare the whole clause to be insensible and meaningless, to adjudge that the Board has done something in vain, and in fact to reject the clause altogether.

We are not at liberty so to do. The learned trial Judge cites authorities to shew that the provision must not be so reduced to a nullity, but that an obvious mistake ought to be corrected.

The appeal must be dismissed, but, as the defendants were guilty of negligence, without costs.

BRITTON, J.:—It is a matter of regret that I am obliged to agree with the decision appealed from, and to say that, "although the defendants were found guilty of negligence in unreasonably detaining and failing within a reasonable time to deliver a car-load of beans shipped by the plaintiff," the plaintiff could not recover damages for that negligence, because he "failed to give notice in writing and particulars of his claim for detention, to the station freight agent at or nearest to the place of delivery, within thirty-six hours after the beans were delivered."

The defendants were in no way prejudiced by the non-delivery of the notice. The condition relied upon by the defendants, as it is printed, and as it was authorised by the Board of Railway Commissioners, would not in itself relieve the defendants.

No doubt, it was the intention of the draftsman of that condition to make it effective and thus protect the defendants from liability in such a case as this. It would have been effective had the word "are" instead of "or" been inserted in the last line of the condition.

To protect the defendants the word "or" must be changed to "are," or must be held to mean in this instance "are," although printed "or."

Inasmuch as this condition was not discussed, and as the attention of the plaintiff was not specially called to it, it cannot in fact be

D. C.

1910

NEWMAN

v.

GRANK  
TRUNK  
R.W. Co.Falconbridge,  
C.J.

D. C.  
1910  
NEWMAN  
v.  
GRAND  
TRUNK  
R.W. Co.  
Britton, J.

said that there was any intention on the part of the plaintiff that the wording should be as if the word "are" appeared where "or" is in the last line.

Upon the facts, the question of law is reduced to this. Should the condition be eliminated as meaningless, or should the Court clothe it with the meaning which the parties placing the condition there intended it to have. I feel myself compelled by authority to adopt the latter alternative, and, doing so, I am of the opinion that the learned Judge is right in saying that the word "are" should be substituted for "or," and so the plaintiff fails.

I would dismiss the appeal without costs.

RIDDELL, J.:—I agree.

---

[RIDDELL, J.]

#### RE ELLIS AND TOWN OF RENFREW.

1910  
May 2.

*Municipal Corporations—Local Option By-law—Voting—Declaration by Clerk—Scrutiny by County Court Judge—Motion to Quash By-law—Inquiry into Validity of Votes—Illiterate Voters—Blind Voter—Ballots Marked by Deputy Returning Officers—Non-compliance with sec. 171 of Municipal Act—Secrecy of Voting—Manner of Voting—Names Improperly on Voters' List—Change of Residence—Married Woman Described as Widow—Discrepancy in Number of Ballots—Exposure of Ballots to Public after Count—Clerk Acting as Deputy Returning Officer—Irregularities—Curative Provisions of sec. 204—Acquiescence of Applicant—Estoppel.*

The result of the voting upon a local option by-law, as declared by the clerk, was that 571 votes were cast for the by-law and 232 against, *i.e.*, a total of 603 votes, of which more than three-fifths were for the by-law. Upon a scrutiny before a County Court Judge one vote which had been wrongly counted for the by-law was transferred to the other side, two ballots were rejected for defect of form, and 10 votes were struck off the winning side, because, as the Judge found, 10 persons had voted who had no right to do so. According to this result, the total of the votes was 591, 358 of which were cast for the by-law, being more than three-fifths. The Judge certified, under sec. 371 of the Municipal Act, 1903, that the by-law had received the approval of more than three-fifths of the electors voting thereon.

Upon a motion to quash the by-law:—

*Quære*, whether there is any necessity for a summing up or declaration by the clerk; but *held*, upon the evidence, that the declaration required by the Act was made by the clerk.

The by-law being now attacked on the ground that it had not in fact received the approval of three-fifths of the electors voting thereon:—

*Held*, that it lay upon the applicant to shew that a sufficient number of votes must be struck off to establish that upon the declaration by the clerk, with the proper changes, the requisite majority was not in fact obtained. The Court should start with the result declared by the clerk, not that found by the County Court Judge; upon motions of this kind the Court may go behind the findings of the County Court Judge—his judgment in disallowing as well as in allowing votes may be attacked.

Of the 371 votes counted in the declaration of the clerk for the by-law, it was admitted that one was counted by mistake for, instead of against; this left 370 for and 233 against:—

*Held*, that it would be necessary to strike 21 votes off the 370 to reduce the majority vote below the statutory minimum. Process of arriving at this figure explained.

The votes of a number of persons, illiterates and others, whose ballots were marked for them by the deputy returning officers were objected to, on the ground that these persons had not been required to take declarations, and that the marking had not been done in the presence of the agents, as required by sec. 171 of the Municipal Act:—

*Held*, in the case of one of these, a blind voter, that no declaration was needed; and as to the irregularity of marking his ballot in his presence alone, and not in the presence of the agents, that his vote could not be struck off on that ground, for the right to vote could not be considered to depend upon the manner of voting.

Two very old women, who stated that they were unable to mark their ballots, were each accompanied into the voting compartment by a relative, with the permission of the deputy returning officer, upon the consent of the agents, including the person moving to quash the by-law, without any declaration of physical incapacity being made:—

*Held*, that these votes could not be struck off; it was not the right to vote, but the manner of voting, that was objected to.

At one of the polling subdivisions there were 6 unmarked or spoiled ballots in the box. There was evidence that one of the voters at this place threw down the ballot upon the table, after having taken it into the voting compartment and returned with it, saying that she would have nothing to do with it. Being examined as a witness upon the motion, she refused to say whether she had made any marks upon the ballot. The ballot was placed in the box. It was contended that her vote should not have been counted:—

*Held*, that the Court, upon these facts, was not bound to find that this ballot was marked at all.

It was sworn that one voter was allowed to mark her ballot in public and without retiring into the compartment. This was not specifically denied:—

*Held*, taking the incident as sworn to, that the vote was not invalidated by an irregularity in voting.

Of the 10 persons found by the County Court Judge to have voted, not having the right to vote, by reason of change of residence, 5 were persons whose places of residence had not been changed since the certification of the voters' list used at the voting:—

*Held*, that the judgment in *In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, 302, did not apply; and the Act prevented an inquiry by the County Court Judge, or by the Court upon this motion, into the right of these 5 persons to vote.

The name of a married woman was entered on the list as "widow." It was shewn that she owned the property assessed to her as "widow," and was the person intended by the description:—

*Held*, that her name was on the list, and she had a right to vote.

In one of the polling subdivisions 220 ballots were handed out, 220 voters were entered as voting, but 221 ballots were taken out and counted:—

*Held*, that, upon this state of facts, a vote should not be struck off the winning side

After the close of the poll in one subdivision the ballots were thrown loosely into a basket, after they had been regularly counted and certified, and were left exposed after the general public were admitted, so that they would have access to them, before they were replaced in the ballot-box:—

*Held*, that this did not affect the result, and at the worst was an irregularity after the taking of the vote.

The clerk of the municipality acted not only as returning officer, but also as deputy returning officer in one of the polling subdivisions:—

*Held*, following *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464, 467, that this was an irregularity; but it was only an irregularity.

Objections to 16 other votes were not considered, as, if they were all allowed, the result would not be affected.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

1910  
 RE ELLIS  
 AND  
 TOWN OF  
 RENFREW.

And *held*, that all the irregularities were covered by sec. 204 of the Act. It was contended that the applicant, who was an agent at one of the polling subdivisions, was estopped by his acquiescence; but *semble*, that in a public matter such as this the doctrine of estoppel has no place.

MOTION to quash a local option by-law. The facts are stated in the judgment.

April 30. The motion was heard by RIDDELL, J., in the Weekly Court at Toronto.

*W. Nesbitt*, K.C., and *J. E. Thompson*, for the applicant.

*W. E. Raney*, K.C., and *S. T. Chown*, for the respondents.

May 2. RIDDELL, J.:—A “liquor license by-law” was submitted to the voters of the town of Renfrew, on the 3rd January, 1910; the vote appeared to be:—

Total.	For.	Against.	Majority.
603	371	232	139

Three-fifths of 603 = 361 +, requiring 362 votes at least for the by-law to secure its being passed by the council: it will be seen that the supporters of the by-law appeared to have secured 9 votes more than the legal minimum.

On a scrutiny before His Honour Judge Donahue, one vote which had been wrongly counted for the by-law was transferred to the other side, and two ballots were rejected for defect of form, leaving the vote:—

Total.	For.	Against.	Majority.
601	368	233	135

Three-fifths of 601 = 360 +, requiring a vote of 361. But the learned Judge then found that 10 persons had voted who had no right to do so. He struck all those off the winning side, so that on his final determination the vote stood:—

Total.	For.	Against.	Majority.
591	358	233	125

Three-fifths of 591 = 354 +, requiring a vote of 355.

He accordingly, on the 23rd February, 1910, certified, under sec. 371 of the Municipal Act of 1903, that the by-law had received the approval of more than three-fifths of the electors voting thereon.

A motion is now made to quash the by-law. The notice of motion contains 16 separate reasons, but all of these were in express terms abandoned upon the argument except Nos. 1, 8, 13, and 16.

For convenience, I speak first of No. 16: “That the by-law



submitted to the said electors was not in fact declared by the clerk or other returning officer to have received the assent of three-fifths of the electors voting thereon, and, in the alternative, if the said clerk or returning officer did purport to so declare the said by-law as having received the said assent, the said declaration was made illegally, the said clerk not carrying out the provision by law provided in that behalf, and that, if he did purport to make such declaration, it is illegal and void and of no effect."

In *In re Duncan and Town of Midland* (1907), 16 O.L.R. 132, it was thought by the Divisional Court that there was no necessity for a summing up or declaration by the clerk at all (pp. 140, 141)—this is criticised by some of the members of the Court of Appeal in the same case; and it is now argued that 8 Edw. VII. ch. 54, sec. 11, amending the Liquor License Act, sec. 143, makes a difference. And it may be that the law is still in a state of uncertainty. But in the present case the affidavits of Mr. Chown and of the clerk make it clear that the declaration was made as required by the Act. This objection, then, must fail.

The declaration gives for the result:—

	For the by-law.	Against the by-law.
First ward.....	124	66
Second ward .....	116	102
Third ward .....	131	64
	<hr/>	<hr/>
	371	232

and is dated the 4th January, 1910.

We must then start with the case, *primâ facie*, that there were 603 votes, of which 371 (*i.e.*, more than three-fifths) were for the by-law.

It was argued that we should start with the result found by the County Court Judge, as being *primâ facie* the correct result, but I do not think so. The duty of the County Court Judge is (sec. 371) "in a summary manner" to "determine whether" three-fifths "of the votes given were for . . . the by-law, and . . . forthwith certify the result to the council." His certificate is a certificate of the result of his determination of whether or not three-fifths of the votes cast were in favour of the by-law—all else is surplusage; and indeed the formal certificate here contains, in fact, no numbers, though the "findings" are attached thereto. The actual number of votes is

Riddell, J.  
1910  
RE ELLIS  
AND  
TOWN OF  
RENFREW.

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

immaterial, although it may be that it is necessary to determine the actual number in order to determine whether three-fifths are cast in favour of the by-law. When the by-law is attacked, it lies upon the applicant, as I think, to shew that a sufficient number of votes must be struck off to establish that upon the declaration by the clerk, with the proper changes, the requisite majority was not in fact obtained. It is the duty of the clerk to "sum up . . . the number of votes for and against the by-law, and . . . declare the result:" sec. 364; and it must, I think, be held that it is necessary for the applicant to strike off enough from the number so declared in order to succeed.

There seems to be no doubt that the Court may go behind the findings of the County Court Judge upon motions of this kind—his judgment in disallowing as well as in allowing votes may be attacked: this has frequently been done.

Of the 371 votes counted in the declaration of the clerk for the by-law, it is admitted that one was counted by mistake for, instead of against; this leaves 370 for and 233 against. Consequently, even if all those to be disallowed be deducted from the winning side, it will need 21 votes to be struck off to reduce the majority vote below the statutory minimum. From what occurred upon the argument it seems necessary to give the very simple and elementary process of arriving at this figure.

Let  $X$  = number of votes to be struck off to reduce the majority vote to three-fifths of the whole.

$$370 - X = \frac{3}{5} (603 - X)$$

$$1850 - 5X = 1809 - 3X$$

$$2X = 41$$

$X = 20\frac{1}{2}$ ; consequently not less than 21 votes must be so struck off. This may be seen by trial. If 20 votes be struck off, 583 remain:  $\frac{3}{5}$  of 583 = 349.8, *i.e.*, 350 votes: but deducting 20 from 370 leaves 350 votes; and the proper minimum has been obtained. But if 21 be struck off, 582 remain, of which  $\frac{3}{5}$  is 349.2, *i.e.*, 350 votes, whereas only 349 have been obtained.

The applicant attacks a number of votes, while relying upon those which have been struck off by the County Court Judge being kept off. As I have indicated, I do not think that the applicant can here succeed by shewing a number of invalid votes together with those struck off by the County Court Judge, sufficient to reduce

the number below the minimum, unless it also appears that the County Court Judge was right. (Of course, if the County Court Judge's figures are taken, the numbers are, total 591, for the by-law 358, so that 9 votes more would be sufficient).

The applicant claims the following cases—

1. Chisholm, Visinski, Kubisenski, Bearon, Rabior, Lepine, Leskie, Kuash, Liturski, Verkus (10 in all) illiterates.
2. Robert Timmons, blind.
3. Mrs. Berlanquet and Mrs. McLaren, old women.
4. Jessie Ferguson, declined to vote, but vote counted.
5. Ann McManus, marked her ballot in public.

In addition to these, Mary Tackman's vote is questioned on the hypothesis that she was also an illiterate; the affidavit of Kelly is to this effect, but her own affidavit shews that this is an error. She signs the affidavit, and I see no reason for not accepting her account of the matter; her vote cannot be struck off. So also in polling subdivision No. 3, Mary Utrunky's vote is attacked, but her own affidavit is to be taken.

In respect of class 1, the fact is that they, claiming to be illiterates, were not required by the deputy returning officer to make any declaration as to their incapacity, but the deputy returning officer took a ballot and marked it for the voter, but not in the presence of the agents, as, it is contended, is required by sec. 171 of the Act. The answer set up to this is that the agents of those opposing the by-law, shewn to be such by the production of a written appointment, made no objection, but acquiesced in the act of the deputy returning officer going into the voting compartment with the voter alone, and then marking for him his ballot, and this without a written declaration from the voter.

The provisions of sec. 171 seem to make it quite clear that in the case of one claiming to be entitled to vote, but that he is unable to read, the declaration is to be in writing. It will be seen that the section provides for (a) those incapacitated by blindness; (b) those unable to read; and (where the voting is on Saturday) (c) Hebrews. The blind (a) need not make a declaration at all: in the case of the Hebrew (c) "the declaration may be made orally:" sec. 171 (4): but there is no provision for the illiterate (b) making his declaration orally—the declaration is "at the time of the polling" to "be made by the person claiming . . . before the deputy

Riddell, J.  
1910  
RE ELLIS  
AND  
TOWN OF  
RENFREW.

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

returning officer, who shall attest the same as nearly as may be according to the form given in schedule F to this Act; and the . . . declaration shall be given to the deputy returning officer at the time of voting:" sec. 171 (3).

The argument for the applicant is that the illiterate is given the right to vote only upon making the declaration; that, consequently, a vote taken as these were is void; and that this is not simply an irregularity. I do not accede to this argument; but it is, in my view, not necessary to decide the question, for reasons that will shortly appear.

(2) In the case of Robert Timmons, the blind voter, I have pointed out that no declaration was needed; but the irregularity of marking his ballot by the deputy returning officer in presence of the voter alone, instead of in the presence of the agents, as required by sec. 171 (1), was committed also in his case. As, however, the right to vote at all cannot be considered to depend upon the manner of voting, this vote could not be struck off in these proceedings, the whole trouble being in the manner of voting.

We did in *In re Duncan and Town of Midland*, 16 O.L.R. 132, say that in the case of those unable to read having their ballots marked for them without the proper declaration having been made, it might be necessary to consider how far this defect was cured by sec. 204 (p. 147); but I do not find that the same remark has ever been made in reference to a blind man. I do not think that I can or should, upon the present inquiry as to numbers, make anything depend upon this irregularity, however much effect it may have in a subsequent investigation of the general manner in which the election was conducted.

(3) Mrs. Berlanquet and Mrs. McLaren are very old women. The former (80 years of age) appeared at the polling-booth, stated that she was not able to mark her ballot herself, and the deputy returning officer, without requiring any declaration, allowed her and her daughter (not sworn to secrecy) to go into the voting compartment. The deputy returning officer, before allowing this, explained to all the scrutineers (including the present applicant, who had produced to the deputy returning officer his written appointment to act for those opposed to the by-law) that he would not allow Mrs. Berlanquet to go into the voting compartment unless they all consented, and "the scrutineers, including the applicant, stated that they were willing and consented thereto."



Mrs. McLaren (95 years of age) was, in the same way, for the same reason, and upon the same explanation and consent, accompanied by her son-in-law.

Mrs. Berlanquet and Mrs. McLaren both marked their ballots themselves, and both swear that the presence of their relative in the voting compartment did not affect the manner in which they marked their ballots. It nowhere appears that the relatives could or did see the way in which the ballots were marked, or the contrary; and it seems manifest that perfect good faith was observed, and that it was simply the physical feebleness of these elderly ladies which occasioned the presence of their friends.

In this class again, it is not the right to vote but the manner of voting that is objected to, and the same remarks apply to these votes as to that of the blind man.

We spoke of such cases in the *Midland* case, at pp. 147, 148, and thought the irregularities trifling in any event.

4. Jessie Ferguson's vote, it is contended, should not have been counted; she is and at the time of the election was a bookkeeper working for the applicant. She had a vote in polling subdivision No. 1, and went into the booth with the intention of voting. She was handed two ballot papers, one for councillors and one for the by-law: she took them and went into the compartment; returning, she says she handed them to the deputy returning officer, but does not remember what she said at the time; she cannot remember that she in any way indicated to the deputy returning officer that she declined to use this by-law ballot; but says that it was immaterial to her. She did not wait to see what he did with it—it was immaterial. Upon being asked whether she had made any marks upon this ballot, she (upon objection taken by counsel for the applicant) refused to answer. The affidavit of Kelly is to the effect that on coming out of the compartment Miss Ferguson handed the councillor ballot to the deputy returning officer, but threw the by-law ballot on the table, saying, "I will have nothing to do with that," and left the polling-booth; but the deputy returning officer placed both the ballots in the ballot-box. The affidavit of the deputy returning officer says: "From the remark of Miss J. Ferguson, when she handed me her ballot re the by-law, that she did not wish to vote on the by-law, I have always considered that her ballot . . . was one of the said unmarked ballots." There

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

were 6 unmarked or spoiled ballots in the ballot-box at this polling subdivision.

I have no great difficulty upon this evidence in arriving at the same conclusion. It seems to me absurd to say that, upon these facts, the Court is bound to find that the ballot of this woman was marked for the by-law or marked at all. Before such a conclusion could be came to, we should at least have some evidence that she marked the ballot.

5. Ann McManus, it is said by Kelly, "on receiving her ballot paper from the deputy returning officer, was allowed by him to mark her ballot in public and without retiring into the compartment." The deputy returning officer and others swear that no one was allowed to mark his ballot in a place where any one could see how she or he marked it.

I do not find that the McManus incident is specifically denied, but, taking the incident as being exactly as sworn to by Kelly, the vote is not invalidated by an irregularity in voting.

The result is, that there are but 10 votes about which there is any question, in my judgment. But it is necessary that there should be 21 struck off, so that if full effect be given to these 10 (or indeed the whole 15) the result will not assist the applicant.

Of course, if the applicant could rest upon the figures given by the County Court Judge, the number to be struck off would be only 9.

$$358 - X = 3/5 (591 - X)$$

$$1790 - 5X = 1773 - 3X$$

$$2X = 17$$

$$X = 8\frac{1}{2}, \text{ i.e., } 9 \text{ votes.}$$

Even if we are to look at the County Court Judge's figures, I am not bound by his findings, and may give effect to them or not as the law seems to require.

He has struck off 12 votes:—

1. James McEwan. His name is on the list which was certified on the 6th December, 1909, but since the 23rd October, 1909, he has not resided in Renfrew.

2. Lawrence Martin, on list, but he left Renfrew in 1906, and has not resided there since, though he came on a visit on the 23rd December, and voted.

3. George Seymour, on list, has not resided in Renfrew from

the 15th July, 1909, to the 23rd December, 1909; came to Renfrew on the 23rd December, and still resides there.

4. James Stringer, on list, but his residence has not been in Renfrew since roll certified.

5. Michael Kelly, on list, not a resident of Renfrew from long prior to the 6th December, 1909.

These 5 are on the same basis.

6. J. K. Rochester, clerk of Renfrew.

7. George Hines.

8. T. W. Gunston.

9. John M. Airth.

These 3 are said not to have their names on the certified list.

10. Janet D. Campbell, a married woman, who has been married for over 20 years, whose name is entered on the list as "widow." The learned Judge says she is not and never was a widow, and consequently he holds that her name is not on the list at all.

11 and 12. Two ballots disallowed.

As to the first 5, there is no pretence that there has been a change of residence subsequent to the certification, and, consequently, the judgment in *In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, at p. 302, does not apply.

I, with great respect for those who differ, agree with what is said by Meredith, C.J., in *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476, at pp. 477, 478, and think that the Act never contemplated the inquiry by the County Court Judge, upon a scrutiny, into such questions as are here gone into; but, of course, I should follow the Divisional Court in a case on all fours. Here, there being no change of residence after the certification by the Judge, the *Saltfleet* case is not in point; and I am of opinion that the Act prevents an inquiry by the County Court Judge or myself into the right of these 5 persons to vote. It is, of course, said that this would result in an anomaly. But we are not a logical people; consistency is too precious a jewel to be lavishly applied in legislation, and the forest of our statutes is full of anomalies.

No. 10 is covered by the *Saltfleet* case, p. 301, when it is remembered that it is proved—it is not denied—that Mrs. Campbell (the voter) owned the property assessed to "Mrs. Campbell, widow," and was the person intended by that description. It might as well be said that an assessment to "John Smith, blacksmith," does not

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

put the name of John Smith, the actual owner of the property' upon the list, because he is a whitesmith.

Supposing full effect to be given to objections by the applicant, No. 1, above, and also, Nos. 6, 7, 8, 9, 11, 12, just referred to, the whole number of objectionable votes would be:—

No. 1	10
“ 6, 7, 8, 9,	4
“ 11, 12,	2

16; and that we have seen is not a sufficient number. I am relieved, therefore, of the necessity of deciding upon any of these.

It will be seen that I might, in the same way, have avoided deciding classes 2 and 3 of the applicant's list; indeed, deciding to be valid any of the votes in the applicant's list in any of the classes would be fatal to him. If he wholly succeeded he would have—

No. 1	10
2	1
3	2
4	1
5	1
County Court Judge's	6, 7, 8, 9, 11, 12, 6

21, the minimum required.

I am not satisfied with several of those I have left undecided, but do not pursue an unnecessary inquiry.

The above disposes of objection 1 (a), (b), (c), (d).

Objection 1 (e) is that in polling subdivision No. 2, 220 ballots were handed out, 220 voters were entered as voting, but 221 ballots were taken out and counted. No explanation of this is given to the County Court Judge, except that of the deputy returning officer, that possibly two ballots were stuck together and handed out at the same time to a voter. This suggestion did not recommend itself to the County Court Judge, who saw the ballots; but he did not think it within his province to strike off a vote from the winning side. I agree with him, and in any case the result would be unchanged.

Objection 1 (f) is that after the poll in polling subdivision No. 1



was closed the ballots were thrown loosely into a basket after they were counted, and left exposed for some time after the general public were admitted, so that they would have access to them, before being replaced in the ballot-box. From the affidavits it sufficiently appears that the deputy returning officer, after the close of the poll, and before the general public were admitted, counted the ballots in the presence of the poll-clerk and scrutineers, and gave his certificate of the result; and there is no pretence that the numbers so shewn are inaccurate. This does not affect the result, and at the worst was an irregularity after the taking of the vote.

I have now disposed of objection 1.

Objection 8 is that the clerk acted not only as returning officer, but also as deputy returning officer in polling subdivision No. 2. This is said to be an irregularity: *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464, at p. 467. But I think it is only an irregularity.

There were, no doubt, a number of irregularities, as we have seen; but I do not think they were of such a character as that sec. 204 should not heal them. "It must not . . . be lost sight of that the voters of each municipality are vested with the right of self-government to a very large extent, and that their wishes should be given full effect to, if at all possible. The Court should strive to do this; and should not be astute to find reasons for interfering with the result which should follow from a voting:" *Midland* case, 16 O.L.R. at p. 140. "The sole duty of the Court is to see whether the people . . . have exercised the power given them by the Legislature, and in the manner prescribed by the Legislature. . . . We must not look for ideal accuracy, for literal compliance with directions . . . In this work-a-day world we must not be too particular—we must be satisfied with substantial compliance with directions—and if . . . the people have expressed their will in substantially the manner in which the Legislature authorizes and permits such expression, the Court should not interfere:" *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317, at p. 341. The curative legislation in sec. 204 of the Act is applied "if it appears . . . that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance . . . did not affect the result of the election." The meaning of this section was considered in *Re Hickey and Town*

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

of *Orillia*, 17 O.L.R. at p. 342, and I am pressed with the judgment in that case, especially with the statement that "secrecy is a great desideratum under the Act." I still adhere to this; but the cases in which persons know how others voted, that is, the cases of those unable to read and the blind man, are cases in which the Act contemplates this shall be known by the deputy returning officer, who did know, and also the agents. The elderly ladies may have let their companions know how they voted; but it does not appear that they did or that they must have done so; the irregularity was unimportant. So with the returning officer, and the disposition of the counted ballots in polling subdivision No. 1, and Mrs. McManus, who was not, as in the *Orillia* case, deprived of the power to vote in secret. I think all the irregularities set out in the affidavits are wholly covered by sec. 204.\*

The motion should be dismissed with costs.

I have not thought it necessary to consider the question whether the applicant is not estopped by his acquiescence. Before acceding to that proposition, I should require further consideration: *Regina ex rel. Regis v. Cusac* (1876), 6 P.R. 303; *Regina ex rel. Harris v. Bradburn* (1876), 6 P.R. 308, at p. 309; *Rex ex rel. McLeod v. Bathurst* (1903), 5 O.L.R. 573.

The *Almonte* case (not reported†) per Meredith, C.J., may be referred to.

As at present advised, I should think that in a public matter like the present, the doctrine of estoppel has no place.

NOTE.—In view of the many cases in which mistakes have been made by solicitors in computing the number of votes necessary to be struck off, I here add the general method on the hypothesis that all the votes struck off are to be deducted from the majority:—

\* 204. No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election.

† *Re Giles and Town of Almonte* (1910), 1 O.W.N. 698.

Let A=total number of votes

“ B=number for the by-law

“ X=number to be struck off to bring the majority to the statutory minimum.

Then  $B-X=3/5 (A-X)$

$$5B-5X=3A-3X$$

$$2X=5B-3A$$

$$X=\frac{5B-3A}{2}$$

2

Or stating the formula in the shape of a rule:—

Subtract three times the total vote from five times the number of votes for the by-law; then divide by 2; and the quotient will be the number of votes necessary to be struck off to reduce the majority to the statutory minimum—of course, if the quotient contain a fraction, the whole number only is to be taken.

[BOYD, C.]

PIGGOTT v. FRENCH.

Riddell, J.

1910

RE ELLIS  
AND  
TOWN OF  
RENFREW.

1910

May 2.

*Intoxicating Liquors—Liquor License Act, sec. 125 (1)—License Inspector—Notice not to Supply Intoxicating Liquor to Named Person—Information by Person not within Statute—“Brother-in-law”—Defamation—Injury to Business—Liability for Innocent Act—Public Officer—Notice of Action—Excess of Jurisdiction—R.S.O. 1897, ch. 88, sec. 2.*

The defendant, the License Inspector for a county, upon the application to him of McK., who was married to the sister of the plaintiff's first wife, knowing that fact, and believing that McK. was the brother-in-law of the plaintiff, issued a notice, under sec. 125 (1) of the Liquor License Act (6 Edw. VII. ch. 7, sec. 33), to the hotel-keepers of the county, forbidding them to deliver liquor to the plaintiff. The section says that, among other persons, “the parent, brother or sister, of the husband or wife” of any person who has the habit of drinking liquor to excess, may require the Inspector to give the notice. The defendant acted in good faith and without improper motive:—

*Held*, that McK. did not come within the statute, and had no more authority to intervene than a stranger; the effect of the unauthorised notice was to promulgate a libel, to injure the plaintiff's business, and to expose him to various disabilities and interfere with his freedom of action; the plaintiff was, therefore, entitled to recover damages from the defendant.

*Connors v. Darling* (1864), 23 U.C.R. 544, 552, followed.

*Held*, also, that the defendant, as a public officer, was entitled, under R.S.O. 1897, ch. 88, to notice of action; but, as he acted without jurisdiction or exceeded his jurisdiction, it was not necessary, under sec. 2, which was the section applicable, that the notice should contain a charge of malice and absence of reasonable and probable cause; it was sufficient to state, as was stated in the notice served, that the act was done unlawfully.

*Moriarity v. Harris* (1905), 10 O.L.R. 610, and *Roberts v. Climie* (1881), 46 U.C.R. 264, specially referred to.

1910  
PIGGOTT  
v.  
FRENCH.

ACTION by William Piggott, a grocer in the town of Wallaceburg, against the License Inspector for the county of Kent, to recover \$2,000 damages for the issue of a notice to the hotel-keepers of the county forbidding them to supply the plaintiff with intoxicating liquor.

Section 125(1) of the Liquor License Act, as enacted by 6 Edw. VII. ch. 47, sec. 33(O.), is as follows:—

“125.—(1) The husband, wife, parent, child of twenty-one years or upwards, brother, sister, master, guardian or employer, of any person who has the habit of drinking liquor to excess—or the parent, brother or sister, of the husband or wife of such person—or the guardian of any child or children of such person—may give notice in writing, signed by him, or may require the Inspector to give notice to any person licensed to sell, or who sells or is reputed to sell, liquor of any kind, not to deliver liquor to the person having such habit.”

One McKnight, who was married to the sister of the plaintiff's first wife, required the defendant, as Inspector, to give the notice, and the defendant, knowing the marriage connection, and believing that McKnight came within the loosely-used expression “brother-in-law” of the plaintiff, gave the notice, naming McKnight as the brother-in-law of the plaintiff.

April 21. The action was tried before BOYD, C., without a jury, at Chatham.

*J. S. Fraser*, K.C., for the plaintiff.

*M. Wilson*, K.C., and *J. M. Pike*, K.C., for the defendant.

May 2. BOYD, C.:—By an amendment of the Liquor License Act in 1906, provision was made that, in the case of any person who has the habit of drinking liquor to excess, the brother or sister of the husband or wife of such person might require the Inspector to give notice in writing to any person licensed to sell liquor of any kind not to deliver liquor to the person having such habit: 6 Edw. VII. ch. 47, sec. 33(O.)

One McKnight, living in Dover, known to the defendant, made application to have the plaintiff proscribed under the Act. The Inspector is required to comply with such application when properly made. He knew that McKnight and Piggott had mar-



ried sisters. He did not know at the time of application that the plaintiff's wife had died, and that he was married again to another wife, but this is not material, as it would only further remove the connection between the families. The Inspector acted on his belief, knowing the facts, that, they having married sisters, McKnight was brother-in-law to the plaintiff, and he so names him in the statutory notice. The statute, however, does not designate a "brother-in-law" as one of the persons who is competent to make the requisition. The compound word is sometimes used colloquially or flexibly to include "the husband of one's wife's (or husband's) sister;" but, as the dictionaries tell us, its proper use is as applied to "the brother of one's husband or wife or the husband of one's sister." However, the language of the statute is specific, and is limited (in this connection) to "the parent, brother or sister, of the husband or wife of the person" addicted to the excessive use of liquor.

In such category McKnight did not come, and he had really no more authority to intervene than the stranger in the street. But the Inspector, knowing the facts of the relationship, accounted that McKnight was the plaintiff's brother-in-law, and that he was within the terms of the statute, and issued the notice "prohibiting sale to inebriate." It was duly forwarded by registered letter to various persons in the locality who were licensed to sell liquor, and this prohibition lasted for two months, there being no provision in the Act for the suppression or determination of it in case it is erroneous or misconceived.

It is a serious matter to stigmatize a man in business as one addicted to the use of liquor in excess—to put this into writing and to publish it among the houses of entertainment as the deliberate act of a public officer. The plaintiff complains of this as a piece of injustice, which also injured his business, and the act appears to be without any foundation under the statute. The effect of the notice served under the statute 6 Edw. VII. ch. 47, sec. 33, is to promulgate a libel (if it is unauthorised) and to expose him to various disabilities and to interfere with his freedom of action to a greater or lesser extent. It is popularly called putting him on "the Indian list"—though neither word is appropriate. This notice appears to have been in some way posted, as it is spoken of as being "taken down," but, whether

Boyd, C.

1910

PIGGOTT

v.

FRENCH.

Boyd, C.  
1910  
PIGGOTT  
v.  
FRENCH.

or not, that would only affect the extent of the publicity; for, like all other unsavoury or disparaging news, it soon gets into circulation. This unwarrantable notice did more or less harm to the plaintiff and his business. The principle of law applicable is well stated in *Connors v. Darling* (1864), 23 U.C.R. 541, 552, in these words: "The law would be in a singularly unsatisfactory state if there could be no redress for such an injury, committed in clear violation of the precise words of the statute law, although without improper motive in the person causing the injury."

What is the legal status of the public officer under R.S.O. 1897, ch. 88, which applies to every functionary fulfilling any public office (sec. 1, sub-sec. 2)? If what he does is done in the execution of his office, he is entitled to notice of action (secs. 13 and 14). This notice is of different character according to the circumstances of the case as defined in the Act. That is to say, if he is acting in respect of a matter within his jurisdiction, and goes wrong, through honest error or innocent irregularity, he is entitled to a notice of action under sec. 1, charging malice and an absence of reasonable and probable cause, and these matters must be proved to establish liability. But if, on the other hand, he acts without jurisdiction (or has exceeded his jurisdiction), under sec. 2 the notice need not contain these charges, and the plaintiff need not prove them in order to recover. The notice in this case set forth that the act was done unlawfully and maliciously. The latter adverb is superfluous—the former was proved.

Now, this case falls under sec. 2, for the reason very plainly stated by Mr. Justice Patteson in *Houlden v. Smith* (1850), 14 Q.B. 841, in a passage quoted by Mr. Justice Osler in *Sinden v. Brown* (1890), 17 A.R. 173, 187: "When the facts of the case are before the officer and could not be unknown to him, and these shew that he has not jurisdiction (jurisdiction in respect to the person charged) and he mistakes the law as applied to these facts—such error of judgment, however honest, cannot give him even a *prima facie* jurisdiction, or even the semblance of jurisdiction." In other words, good faith and honest intention cannot create an authority to act, when the facts before, or known to, the officer, shew that the matter is outside of or beyond his jurisdiction.

There is really no discrepancy in any of the cases cited.

*Kelly v. Barton* (1895), 26 O.R. 608, 22 A.R. 522, and *Sinden v. Brown, supra*, are both recognised as of authority and in accord, in one of the latest cases, *Moriarity v. Harris* (1905), 10 O.L.R. 610, which reverses the decision below, cited to me, in (1904), 8 O.L.R. 251. I would also note a valuable decision on some of the matters herein touched upon, to which I have been referred by my brother Osler: *Roberts v. Climie* (1881), 46 U.C.R. 264.

Judgment must, therefore, be entered for the plaintiff with \$100 damages and costs of action.

---

[BOYD, C.]

EVERITT v. TOWNSHIP OF RALEIGH.

*Highway—Obstruction at Side of Road—Injury to Travellers—Condition of Highway—Negligence—Cause of Injury—Overcrowded Vehicle—Municipal Corporations—Gas Company—Costs.*

Boyd, C.  
1910  
PIGGOTT  
v.  
FRENCH.

1910  
May 2.

The plaintiffs on a dark night were driving in an overcrowded buggy upon a township line highway—the centre part, designed for vehicles, being in good repair—when the buggy upset upon the edge of the ditch at the side of the central travelled roadway, and the plaintiffs were thrown against some hard substance—they said, iron piping left uncovered by the defendant gas company upon the highway, beyond the ditch and next to the fence, on the part designed for pedestrians—and injured:—

*Held*, assuming that the plaintiffs were thrown against the piping—and that, though not the cause of the injury, occasioned its serious extent—that the proximate cause was the upset of the buggy, which was facilitated at least by its overcrowded and top-heavy condition; that the plaintiffs were not exercising reasonable care; and, although the piping was an obstruction upon the pedestrian part of the way, it could not be said that the municipalities failed to exercise proper care for the safety of travellers upon the central part by permitting it to lie there uncovered.

The action was dismissed as against all the defendants without costs, the uncovered condition of the piping being considered in dealing with the costs.

ACTION by husband and wife against the Municipal Corporations of the Townships of Raleigh and Harwich and the Volcanic Oil and Gas Company for damages for personal injuries sustained by the plaintiffs by being upset while driving along the town line between Raleigh and Harwich in a buggy, and thrown, as the plaintiffs alleged, against an iron pipe left by the gas company upon the highway. The facts are stated in the judgment.

April 21 and 22. The action was tried by BOYD, C., without a jury, at Chatham.

1910  
EVERITT  
v.  
TOWNSHIP  
OF  
RALEIGH.

*O. L. Lewis, K.C., and W. G. Richards, for the plaintiffs.*  
*M. Wilson, K.C., and J. M. Pike, K.C., for the defendants the township corporations.*  
*J. G. Kerr, for the defendant gas company.*

May 2. BOYD, C.:—As regards this litigation, the situation of the defendants with respect to the highway is to be considered, and also is to be considered the situation of the plaintiffs as claimants for damages on account of injuries received upon the road.

The non-repair or rather the obstruction complained of is the existence of a line of iron piping for the supply of natural gas, about three and a half inches in diameter, laid along the surface of the ground at the side of the road. The gas company had the right to use the highway for their pipes, but, by the agreement with the municipalities, they were to be buried in the earth—which had not been done at the day of the accident. By-laws had been long existing which provided for the setting apart of fifteen feet space on each side of the road allowance for use of pedestrian travel; adjoining this fifteen feet space are placed the ditches on each side, which are but slight depressions, and in the middle, between the ditches, lies the travelled part of the road used for horses and vehicles. This is thirty-three feet wide, and is, including the slopes of the ditches, in exceptionally good repair; safe and convenient for all the requirements of the locality and for all purposes of ordinary traffic and user.

The plaintiff and his wife were both injured by falling, it is alleged, on the gas pipe, and suffering injuries greater as to the husband than in the case of the wife. Contact or impact was occasioned in this way. He was at the town line with his family and friends, and had a hired buggy intended to carry two people. Being disappointed in the arrival of the electric cars, and a rain and thunder storm coming on, it was resolved that all should drive to Chatham, three miles distant. It was so pitch-dark that one could not see the road, and the horse was left pretty much to take his own way. There was some conflict about the speed, but I should infer his pace was slow, as he had to draw a load of eight persons (four adults and four children) all packed in the buggy, with the husband driving and sitting on the knees of Mrs.



Taylor, who had a baby in her arms. The road was slippery and greasy with rain, and at the place of the accident the horse had worked toward the edge of the ditch, and the wheels began to slip down, when the driver gave a pull at the rein, jerking the horse round, and probably clamping the rubber-tired wheel on the side of the buggy, and the outcome of all was that the buggy upset. The eight occupants were distributed around the muddy ditch, and all escaped injury except the plaintiffs (husband and wife). They were flung against some hard substance; it is suggested the edge of the foot-path—they say, against the iron pipe.

The *causa causans*—the proximate cause of the accident—was the upset of the buggy, which was facilitated at least by its overcrowded and top-heavy condition. So far as the central travelled highway was concerned, it had nothing to do with the misfortune, by reason of want of repair. If the impact was upon the iron pipe, that was, no doubt, an obstruction on the pedestrian part of the way, but it was placed there as a means of public utility, though left exposed on the surface. I find nothing just in point in the authorities, though this transaction more nearly approaches *Bell Telephone Co. v. City of Chatham* (1900), 31 S.C.R. 61, than it does *Pow v. Township of West Oxford* (1908), 11 O.W.R. 115, 13 O.W.R. 162.

The obstruction at the roadside was not the cause of the injury, but it may be taken to have occasioned its serious extent. It cannot be held, I think, that the company in the buggy and the driver were in the exercise of reasonable care for their own safety when they started on this journey on a pitch-dark rainy night in an overcrowded vehicle. Nor can it be held that the municipalities failed to exercise proper care for the safety of horses and carriages and travellers therein by permitting the pipe to lie uncovered at the place next the fence at the side of the road and inside the well-beaten foot-path. It could not be anticipated as a likely result that such a mishap as this would occur, and that one could be thrown from the travelled road, which was in good repair, upon this obstruction, in the place intended for pedestrians.

Costs were multiplied in this case as to pleadings and witnesses and separate defences. Taking it that the plaintiffs were hurt on the iron pipes, which should have been covered with soil,

Boyd, C.

1910

EVERITT  
v.  
TOWNSHIP  
OF  
RALEIGH.

Boyd, C.  
 1910  
 EVERITT  
 v.  
 TOWNSHIP  
 OF  
 RALEIGH.

I think that their condition should be considered in dealing with the costs. I would, therefore, while dismissing the action, do so without costs.

Should the case go further, it may be well to say that, had damages been, in my opinion, recoverable, I would have given the man \$600 and his wife \$100.

[RIDDELL, J.]

1910  
 May 3.

RE BEGG AND TOWNSHIP OF DUNWICH.

*Municipal Corporations—Local Option By-law—Voting on—Majority—Votes Objected to—Number Necessary to Destroy Majority—Posting Copies of By-law—Publication in Newspaper—Municipal Act, 1903, sec. 338 (2)—Omission—Effect on Result—Application of sec. 204—Negligence of Municipal Officers—Costs.*

A local option by-law was submitted to the electors and approved by a vote of 481 in favour of the by-law out of a total vote of 781, the statutory minimum being thus exceeded by 12:—

*Held*, that the least number of votes which would require to be struck off to destroy the majority was 32; and therefore it was not necessary, upon a motion to quash the by-law, to consider the objection that 20 persons voted who had no right to vote.

2. Upon the evidence, sec. 338 (2) of the Municipal Act, 1903, had not been complied with, copies of the by-law not having been put up at four of the most public places in the municipality; and sec. 204 of the Act did not apply to heal this defect, the onus of proving that the omission had not affected the result being upon the municipality, and not having been met; and upon this ground the by-law should be quashed.

3. The by-law was published in a newspaper issued outside the municipality in a certain village, without the authority of a resolution by the council, as required by sec. 338 (2). The clerk said, "We always get our printing done there:—"

*Held*, following *In re Salter and Township of Beckwith* (1902), 4 O.L.R. 51, that an objection to the by-law based on this irregular publication was not tenable.

Remarks on the neglect of municipal officers to observe the plain directions of the statute.

Costs imposed on the municipality.

MOTION to quash a local option by-law. The facts are stated in the judgment.

May 2. The motion was heard by RIDDELL, J., in the Weekly Court at Toronto.

*Frank McCarthy*, for the applicant.

*J. M. Ferguson*, for the township corporation.

May 3. RIDDELL, J.:—A by-law to prohibit the sale of liquor was submitted to the voters of the township of Dunwich on

Monday the 3rd January, 1910, with the result that of a total vote cast of 781, 481 were in favour of the by-law:  $\frac{3}{5}$  of 781 = 468.6, *i.e.*, 469 votes were required; and consequently the by-law received a vote exceeding the statutory minimum by 12. The by-law was passed by the council on the 7th March, there having been no scrutiny.

A motion is now made to quash the by-law, on some twelve grounds, but on the opening of the argument only three were pressed, the others being expressly abandoned.

1. It is claimed that the clerk of the municipality voted and that some 19 others, who had in fact no vote, also voted. I do not need to pass upon any of these votes, for, applying the proper rule, which I have again mentioned in *Re Ellis and Town of Renfrew*, ante 74, it will be found that the least number of votes which would require to be struck off to destroy the minimum is 32. 31 votes taken off would make the larger vote ( $481 - 31 = 450$ ) exactly  $\frac{3}{5}$  of the total.  $\frac{3}{5}$  ( $781 - 31$ ) =  $\frac{3}{5}$  (750) = 450: it would require at least 32 votes to be struck off to destroy the majority. The solicitor seems to have considered that 20 votes would be enough, as  $12 = \frac{3}{5}$  of 20; but, as I have pointed out in *In re Armour and Township of Onondaga* (1907), 14 O.L.R. 606, this method of computation is not correct.

Upon these figures being shewn to counsel, he did not further press this objection.

2. The notices were not properly posted, as required by sec. 338(2) of the Municipal Act, 1903.\*

At least as early as 1850, the Courts said that corporations should be careful to preserve proof of regular notices by affidavit of persons employed to put them up: *In re Lafferty v. Municipal Councils of Wentworth and Halton* (1850), 8 U.C.R. 232. (Now,

\*338. In case a by-law requires the assent of the electors of a municipality before the final passing thereof, the following proceedings shall, except in cases otherwise provided for, be taken for ascertaining such assent:—

2. The council shall, before the final passing of the proposed by-law, publish a copy thereof in some public newspaper published either within the municipality or in the county town, or in a public newspaper published in an adjoining or neighbouring local municipality, as the council may designate by resolution; and the publication shall, for the purpose aforesaid, be continued in at least one number of such paper each week for three successive weeks; and the council shall put up a copy of the by-law at four of the most public places in the municipality.

Riddell, J.

1910

RE BEGG  
AND  
TOWNSHIP  
OF  
DUNWICH.

Riddell, J.

1910

RE BEGG  
AND  
TOWNSHIP  
OF  
DUNWICH.

of course, statutory declarations should be taken.) But corporations from that day to this continue to omit the proper precautions, and trouble frequently ensues. In the present case I am left to find out the facts from an examination and comparison of the evidence adduced.

The clerk says at first that the only copy of the notice he posted up personally was that in the town hall of Wallacetown, where the council met (Q. 54), some place inside the building where it was exposed to view (Q. 55), the building being used particularly for township purposes and council meetings being held there alternately (Q. 56), open upon the day the council met (Q. 57), and the notice being posted upon that day (Q. 58). The keys are kept by Mr. Shepherd (Q. 64), and the hall kept locked up when not used for public purposes (Q. 75), and consequently locked up in a good part of the time (Q. 78). Shepherd swears that he is perfectly satisfied that there was no copy of the notice posted up in the hall anywhere where it could be seen; if there had been, he, the caretaker, would have seen it, and he did not see it. The last meeting of the council was on the 15th December, 1909, and between that date and the 3rd January, the day of the election, the hall was kept locked, except the night of the 1st January, 1910, when a dance was held there.

It seems to me that, even if it had been proved that this notice was posted in the hall (which I much doubt), it would be an abuse of language to call a hall kept locked up against the public one "of the most public places in the municipality." The notice might, for all practical purposes, as well have been put at the top of a telegraph pole.

Then the clerk says he posted one in his own township office in Dutton, which he keeps open three days in the week, but the notice was posted in a part of the office occupied by one McIntyre who keeps open all the time, in McIntyre's private office, the part particularly occupied by McIntyre, but which would be traversed by any one coming into the clerk's office, and the notice was posted on the partition right in front of the door.

McIntyre "is a retired gentleman that lives in Dutton" (Q. 89); "a man that loans money and does business of that kind" (Q. 90); and this "is his own private office" (Q. 91).

The third notice posted, according to the story by the clerk,



was in the post office in Dutton, at which a great many (the clerk says one-third) from the township get their mail. Dutton is an incorporated village, forming no part of the municipality, but surrounded by the municipality, and it is argued by the applicant that these places in Dutton are not "public places in the municipality."

Then as to the other copies. The clerk gave one copy or more to the reeve, McLachlin, one or more to a councillor, McKillop, two to one Kerr, and one to Peter Campbell, to put up, but cannot say if any of these was put up. He intended to put one up in the Wallacetown post office, where people get their mail, but forgot. The most public places the clerk can think of are Dutton P.O., Wallacetown P.O., Tyrconnell, Iona Station, Cowal, and Campbellton; McLachlin lives at Cowal, McKillop at Tyrconnell, Kerr at Iona Station, and Campbell at Campbellton; and the copies given to these gentlemen seem to have been intended to be by them posted up at these places. No care seems to have been taken by the clerk to ascertain if the copies were actually posted outside of Dutton. Wallacetown is the principal post office in the township, and the clerk says either the post office or the hotel or the store would be the most public place in Wallacetown; no notice was posted at any of these places.

There is evidence as to some of these notices delivered out by the clerk. McKillop gave a copy to Page, the assistant postmaster of Tyrconnell, and the assistant postmaster, on or about the 16th December, 1909, posted it up.

There is an affidavit by Mrs. Bennett that she saw a copy in the post office at Cowal—she is the postmistress. If her statement is true, this would be the copy given to McLachlin. No affidavit is made by McLachlin, and it is said that he said he had put the notice in his pocket, but could not recall what he had done with it; but, as Mrs. Bennett's affidavit is positive and is not contradicted, and she was not cross-examined, I think the statement is to be accepted.

Mrs. Gill, the wife of the postmaster at Campbellton, who assists her husband in the post office, swears that she remembers a copy of the by-law "posted up in the post office at Campbellton before the 3rd day of January, A.D. 1910." On being examined, she says that a notice had been handed in to be posted

Riddell, J.

1910

RE BEGG  
AND  
TOWNSHIP  
OF  
DUNWICH.

Riddell, J.  
1910  
RE BEGG  
AND  
TOWNSHIP  
OF  
DUNWICH.

up, and no permission asked to post up, and she says that she does not think it was the liquor by-law—all she can remember was something with A. M. McPherson's name as deputy returning officer on it (Q.Q. 35, 36, *sqq.*). She did not read it (Q. 5), and what she saw posted was there before the day of voting, but on being asked (Q. 51), "Some time before it?" she answers, "I don't exactly know, for I don't remember." Campbell himself does not make affidavit, but he told the clerk that he may have put up the notice, but does not remember it.

There is no evidence that Kerr put either of his copies up at Iona; and it was not on the argument contended that he had done so. Consequently the "postings" to be considered are:—

1. That in Wallacetown town hall—that I have held not to be in pursuance of the statute.

2. That in the office of McIntyre.

3. That in the post office at Dutton. These are both outside the township, though geographically within its outside limits.

4. That in Cowal post office. That I have held is within the statute and proved.

5. That in Campbellton post office. As to the last, with much doubt, I think that, as Mrs. Gill can say only that what she saw was a copy having A. M. McPherson's name as deputy returning officer, thinks it was not the liquor by-law, and cannot remember if it was relating to councillors, it must be held that there is no evidence from which to draw the conclusion that the proper notice was posted. If it were so, no doubt some one could be found who had seen it.

If I am correct in this conclusion, there is no need of examining further upon this point. But I am clear that, even supposing Dutton to be "in the municipality," the place in McIntyre's office has no claim to be considered one "of the most public places"—the clerk himself does not suggest as much.

I think sec. 338(2) has not been complied with.

The remaining question upon this objection is whether sec. 204\* applies to heal this defect.

\*204. No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election.

In *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464, it was held by Osler, J.A. (p. 467), that "the onus of proving that the omission to comply with" the statutory direction "has not affected the result is upon the respondents." See also *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317, at pp. 331, 332, 342; *In re Salter and Township of Beckwith* (1902), 4 O.L.R. 51.

This the respondents have wholly failed to meet, and I think the by-law cannot stand.

3. The third objection is to the publication. This was in a paper in the village of Dutton, and consequently not in the municipality of Dunwich, without a resolution by the council.

Section 338(2) provides: "The council shall . . . publish a copy . . . in some . . . newspaper published either within the municipality or in the county town, or in a public newspaper published in an adjoining or neighbouring local municipality, as the council may designate by resolution." There was no such resolution, but the clerk says. "We always get our printing done there." I think I am bound by the judgment of my brother Britton in the *Salter* case, 4 O.L.R. 51, at pp. 52, 53, to hold that this objection is not tenable.

I cannot leave this case without again regretting the negligence of municipal officers who fail to observe the plainest directions of the statute which governs them, and so land their municipality in difficulties. Such officers are unfaithful servants, and do not do the work for which they are paid. The utmost consideration should be had for those who in good faith mistake the meaning of an ambiguous or obscure statute; but, where the language of the Legislature is plain, and the formalities to be observed are simple, it cannot be too much to expect that obedience which must needs follow an honest endeavour to do duty.

Had I been able to support the by-law, I should not have awarded the township costs; and, as the motion succeeds, I think the township must pay costs.

Riddell, J.

1910

RE BEGG  
AND  
TOWNSHIP  
OF  
DUNWICH.

[RIDDELL, J.]

RE PERRIE.

1910

May 5.

*Will—Construction—Devise to Two—Joint Enjoyment so Long as One “Remains Unmarried”—Death—Survivorship—Bequest of “Contents” of House—Personal Jewellery.*

The testatrix devised and bequeathed “my residence and property . . . and all the contents thereof, with my horses, carriages, harnesses, and stable furniture, to my executors in trust to allow my husband G. P. and Theresa M. B. K. to jointly enjoy the same as long as G. P. remains unmarried, but if he marry then to T. M. B. K. for life, and if said T. M. B. K. marry and leave a child or children her surviving, then I give devise and bequeath said property to such child or children, but if said T. M. B. K. die without a child or children her surviving, then said property is to fall into the residue of my estate. . . .” T. M. B. K. married in 1908 and had issue; G. P. died in January, 1910:—

*Held*, that, while a surviving husband ceases to be in a state of widowhood when he dies, he still “remains unmarried;” and the effect of the will was to continue the enjoyment by T. M. B. K. after the death of G. P.; and, as the enjoyment was to be joint, she had the right of survivorship, and thus the sole right for her life to the enjoyment of the residence and property and contents.

*Rishton v. Cobb* (1839), 5 My. & Cr. 145, explained and followed.

*Held*, also, that the personal jewellery of the testatrix, found in the residence at her death, was covered by the words “all the contents thereof,” although practically the idea of joint enjoyment of it or enjoyment at all by G. P. was excluded—the fact that the enjoyment could not be by both at the same time, and probably by one not at all, could not change the meaning of the words.

MOTION by the executor of the will of Elizabeth Ann Perrie for an order determining certain questions arising in the administration of the estate, as to the construction of the will, etc. The facts are stated in the judgment.

May 2. The motion was heard by RIDDELL, J., in the Weekly Court at Toronto.

*G. Lynch-Staunton*, K.C., for the executors.

*F. W. Harcourt*, K.C., for a class of beneficiaries.

*G. H. Levy*, for societies benefited under the will.

May 5. RIDDELL, J.:—The testatrix by her will, after providing for certain beneficiaries (including her husband, Gideon Perrie), made the following provision:—

“31. I give devise and bequeath my residence and property at the north-west corner of Bay and Hunter streets, Hamilton,



and all the contents thereof, with my horses, carriages, harnesses, and stable furniture, to my executors in trust to allow my husband Gideon Perrie and Theresa Mabel Barry Kuntz to jointly enjoy the same as long as Gideon Perrie remains unmarried, but if he marry then to Theresa Mabel Barry Kuntz for life, and if said Theresa Mabel Barry Kuntz marry and leave a child or children her surviving, then I give devise and bequeath said property to such child or children, but if said Theresa Mabel Barry Kuntz die without a child or children her surviving, then said property is to fall into the residue of my estate and become a part thereof."

Riddell, J.

1910

RE

PERRIE.

Then comes a residuary clause; and then follows:—

"33. I authorise and empower my executors and trustees to sell and convert into money all such portions of my estate not herein specifically disposed of as soon after my decease as they in their discretion shall deem it for the benefit of my estate, and for that purpose to execute all necessary and proper deeds and other instruments, but they may without incurring any liability for any loss which may happen therefrom defer such conversion until they in their uncontrolled discretion shall deem best for my estate."

There is also a clause whereby the institutions for whom Mr. Levy appears become in a certain event entitled to a share of the residue, and these sufficiently represent the residuary legatees—an order may, if desired, be taken out to that effect.

At the death of the testatrix there were in the house described in paragraph 31, in addition to the usual household furniture, etc., a number of rings and some other jewellery, her property, in value over \$1,000.

The widower and Miss Theresa M. B. Kuntz occupied the house until about 1906, when Mr. Perrie failed in health and became of unsound mind. Thereupon, as he had no present use for the furniture and contents, etc., of the house, being elsewhere attended to, the executors thought it well that these should be sold. Miss Kuntz, being still an infant, gave her consent so far as she could consent; and, by leave of the Court, the furniture and contents (except the jewellery spoken of), the horses, carriages, harness, etc., were sold, producing nearly \$2,000; and the house was rented.

Riddell, J.

1910

RE

PERRIE.

In 1908 an application was made to the Court for opinion, advice, and direction, and on the 20th February, 1908, a judgment was made by Mr. Justice Clute declaring and adjudging (amongst other things) Mr. Perrie and Miss Kuntz entitled both to the revenue from the proceeds of this sale and to the revenue produced by renting the house.

In the fall of the same year, Miss Kuntz married and is now Mrs. Wardell. She has issue, one daughter. After residing in Winnipeg for a time, she has returned, and is now living in the house, with husband and child.

Mr. Perrie died in January, 1910.

The house is old and not in good repair; and Mrs. Wardell feels that she cannot afford to pay for repairs, rent, taxes, etc.; and the suggestion is made that the house should be sold and the proceeds applied in buying or building another house in substitution.

A number of questions are submitted, all of which have reference to the provisions of paragraph 31 above.

It will be seen that the judgment of my brother Clute was made during the lifetime of Mr. Perrie; still material advantage can be derived from that judgment even in the changed state of affairs.

The paragraph in question disposes of mixed property, real and personal. The executors take all, in trust to allow Mr. Perrie and Mrs. Wardell jointly to enjoy the same so long as Mr. Perrie "remains unmarried;" but, if he marry, then upon other trusts. There is no express provision for the case that has happened, that is, Mr. Perrie dying without remarriage; and it is suggested that there is now an intestacy.

In *Rishton v. Cobb* (1839) 5 My. & Cr. 145, a very curious case, the Lord Chancellor, Lord Cottenham, considered an expression not dissimilar. There there was bequest to trustees in trust to invest in government securities "upon trust to authorise Lady F.C. . . . to receive the dividends as they become due, so long as she shall continue single and unmarried; but in case she sells," etc., then over. The Lord Chancellor (p. 152), points out that "if . . . she had been single and unmarried, and had so remained, she would have been entitled to the dividends, without any limitation of time. . . . This is different from a gift of

dividends during widowhood. The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest. The gift, therefore, is of the dividends of stock without limitation of time, which carries the stock itself."

This decision came in question in *In re Boddington* (1883), 22 Ch. D. 597 (a case in which the testator believed the beneficiary to be his wife, but she was not). Fry, J. (p. 603), says: "I repeat that I am not perfectly clear that I apprehend the principle on which Lord Cottenham there proceeded;" but he does not affect to overrule the decision. In the Court of Appeal (1884), 25 Ch. D. 685, Lord Selborne, L.C., says (p. 689): "With regard to the case of *Rishton v. Cobb*, the respect I feel for the great Judge who decided it prevents my saying more . . . than that I do not understand it, and that if it were applicable to this case I should hesitate for some time before I could follow it . . . *Rishton v. Cobb* . . . does not bear on the present case, and if it did it would take some time to convince me that it ought to be followed." Cotton, L.J., says also that *Rishton v. Cobb* does not apply, and gives the distinction between the two cases which is of importance in the present. In *Rishton v. Cobb* the annuity, as we have seen, was payable "so long as she shall continue single and unmarried," and, as Cotton, L.J., says (p. 690): "Whether rightly or wrongly, Lord Cottenham held that there was there an absolute gift of an annuity to be cut down only in the event of marriage after the testator's death." "But" (he continues) "in the present case . . . the gift commences with the limitation of a period 'to pay to my said wife so long as she shall continue my widow and unmarried.' So the annuity was in its creation determinable. The argument was that the limitation referred substantially only to one event, namely, her marrying somebody else. But the will refers to her widowhood as well as to her future marriage. Probably the latter was unnecessary, but it was introduced in order to shew expressly that even if she was his widow at the time of his death a future marriage would determine the annuity." The case, it will be seen, is well summed up in the head-note: "Although if the lady had been the testator's wife at his decease the words 'shall continue my widow

Riddell, J.

1910

RE

PERRIE.

Riddell, J.

1910

RE

PERRIE.

and unmarried,' might have been in substance the same as 'shall continue unmarried,' the reference to widowhood could not . . . be treated as surplusage, but was the principal part of the condition, and that as the lady did not at the testator's death fill the position of the testator's widow, she could not take the annuity. . . . *Rishton v. Cobb* doubted."

Whether I am equally unable to understand *Rishton v. Cobb* is of no importance; there is no need that I should understand it—it must be followed unless overruled, which it is not. On the contrary, in *In re Howard, Taylor v. Howard*, [1901] 1 Ch. 412, it is expressly held binding by Farwell, J. A testator directed his executor to set aside £200 and thereout pay the testator's wife £3 monthly so long as she remained unmarried, or until the £200 became exhausted, the said payment of £3 monthly to cease on the wife marrying again." She died unmarried before the £200 was exhausted. Her executor claimed the unused balance, and all parties cited and relied upon *Rishton v. Cobb*. Farwell, J., held that the Court of Appeal did not and could not overrule this case, and decided that the executor was entitled to the balance as claimed.

I need not examine the words "remain" and "continue;" "remain" means "continue:" *Beard v. Smith* (1827), 22 Ky. (6 T. B. Monroe) 430, at p. 489; and "continue" means "remain:" *Grey v. Newark Plank Road Co.* (1900), 65 N.J. Law 51.

Nor is there any need of considering what "remain unmarried" or "continue unmarried" may mean in other cases, as to which *Knox v. Wells*, [1883] W.N. 58, *per* Bacon, V.-C., *Re Burlington, Hammond v. Rogerson* (1899), 107 L.T.J. 82, *per* North, J., and the like, may be of interest.

I think that it is decided for me by binding authority that if a man by his will leave a fund in trust to pay an amount thereout, being proceeds thereof by way of interest or otherwise, to his wife so long as she remains unmarried, she has a vested right in the fund until she marries, and, if she die without marrying, the fund belongs to her estate—the single limitation referring "only to one event, namely, her marrying somebody else:" *In re Boddington*, 25 Ch. D. at p. 690. But the case is different if the limitation be "during her widowhood"—in that case the right ceases with the death.



I think that the real meaning of *Rishton v. Cobb* is that the surviving widow ceases at death to be in a state of widowhood, but does not cease to "remain unmarried" or to "continue unmarried." This is but an interpretation of the meaning in law of the different expressions.

There can be no difference in the case of a surviving husband—he ceases to be in a state of widowhood (and "widowhood" applies to the condition of a widower as well as to that of a widow, although some very pretentious dictionaries have not found this out) when he dies, but does still "remain unmarried."

In the present case, then, as it would appear, the effect of the paragraph is to continue the enjoyment by Theresa M. B. Kuntz—Mr. Perrie in the event "remains unmarried."

Then it is plain that, as the enjoyment was to be "joint," and since the right of survivorship is of the essence of joint occupancy, Mr. Perrie's representatives have no rights in the premises, and Theresa M. B. Kuntz has the sole right.

As to her exact right, I do not read the protasis or hypothesis "if he marry" as being effective throughout the remainder of the paragraph as a condition—I think it is exhausted by the apodosis "then to Theresa Mabel Barry Kuntz for life," and need be no further noticed. Then is introduced a new protasis "if said Theresa Mabel Barry Kuntz marry and leave a child or children her surviving, then" over; this is an entire conditional provision. Then follows, "if said Theresa Mabel Barry Kuntz die without a child or children her surviving, then" over into the residue.

The decision of my brother Clute has put the revenue from the proceeds of the sale of the chattels on the same footing as the enjoyment of the chattels in specie, and the revenue from the rent on the same footing as the enjoyment of the house. Mrs. Wardell then is entitled for her life to the revenue from the sale money, and, moreover (as the house is not rented), she has the right for life to the enjoyment of the house; and, as the executors cannot sell this property, under paragraph 33 of the will, it being specifically disposed of—if it be thought best in the interests of all concerned that the house be sold, there can be no objection to the executors agreeing to pay her interest upon the price obtained for the house or the revenue therefrom. Such an arrangement,

Riddell, J.

1910

RE  
PERRIE.

Riddell, J.

1910

RE  
PERRIE.

with the details properly approved of by the Official Guardian, may be submitted to me or other Judge at any time.

The jewellery has not been sold—the question arises whether that is covered by the words “all the contents thereof” in paragraph 31. I have been somewhat troubled by the consideration that Mr. Perrie and Theresa M. B. Kuntz were to enjoy “jointly” what is covered by these words; and it is to be presumed that the man would not be expected to wear the rings, etc.; so that the idea of contemporaneous joint enjoyment is not only excluded but also the idea of enjoyment at all personally by Mr. Perrie. But the same remark would apply to many other articles; and we must take the meaning of the words of the paragraph in a common sense way. What was left was to be for the advantage and pleasure of the two who were left, each in his or her own way—and the fact that the enjoyment could not be by both at the same time, and probably by one not at all, cannot change the meaning of the words.

Cases may not be very helpful; the nearest I can find is *In re Johnston, Cockerell v. Earl of Essex* (1884), 26 Ch. D. 538. The words there were, “household furniture, paintings, books, china, and the whole contents of my said house, No. 9, Belgrave Square:” see p. 540. A box of jewellery, consisting as here of personal ornaments, was, at the time of the execution of the testamentary instrument, in the house of the testatrix at No. 9, Belgrave Square, but at the time of her death was at her bankers’; and the question arose whether that jewellery passed under the above words. The Court (Chitty, J.) says (p. 553): “Jewellery is not appropriate to a house in any sense. Jewellery is merely for personal use and personal ornament, and the gift is a gift of things described by locality only; but I find that the locality to which the goods ought to be ascribed is the house at Belgrave Square. . . . I think therefore that I shall be only giving effect to the intention of the testatrix . . . by holding, as I do, that this box and the contents pass as part of the contents of the house.”

In *In re Robson, Robson v. Hamilton*, [1891] 2 Ch. 559, a gift of a desk “with the contents thereof” was held to pass choses in action in the desk; but that case is not here in point. Nor is

*Re Miller, Daniel v. Daniel* (1889), 61 L.T.R. 365, in which North, J., discusses many cases upon words not dissimilar.

In the present case, I think, to use the words of Chitty, J., "I shall be only giving effect to the intention of the testatrix by holding, as I do, that this" jewellery passes "as part of the contents of the house."

The foregoing considerations will enable an answer to be given to the questions asked. They are here subjoined with the answer to each:—

(a) Whether or not the said Theresa Mabel Barry Wardell is entitled to have the proceeds derived from the sale of the contents of the residence referred to in paragraph 31 of the said will, including the proceeds derived from the sale of the horses, carriages, harness, and stable furniture, of the said testatrix, applied for the purpose of refurnishing the said residence. No: she is entitled to the revenue for life.

(b) Whether or not the trustees should pay the income derived from the investment of the proceeds from the sale of the personal property in the last paragraph hereof mentioned to the said Theresa Mabel Barry Wardell or to whom should they pay it? To Mrs. Wardell: she is entitled to it.

(c) Whether or not, the said Gideon Perrie having died on the 17th day of January, 1910, the said Theresa Mabel Barry Wardell is now entitled to a life estate in the residence referred to in paragraph 31 of the said will. Yes: R.S.O. 1897, ch. 119, sec. 11, has no application—the joint tenancy appears on the face of the will.

(d1) Whether or not the following articles of jewellery of the said Elizabeth Ann Perrie, all of which were in the said residence referred to in paragraph 31 of the said will, are to be deemed and considered part of the contents of the residence referred to in paragraph 31 of the said will, viz.:—

1 diamond ring, 3 diamonds.

1 diamond ring, 3 diamonds.

1 pr. diamond ear rings.

1 opal ring, 5 opals.

1 emerald and pearl ring.

1 diamond and opal ring.

Riddell, J.

1910

RE  
PERRIE.

Riddell, J.

1910

RE

PERRIE.

besides one watch, two gold locketts, one fob, one enamel brooch, and one small stone. Yes.

(d2) 1. Whether or not Theresa Mabel Barry Wardell is entitled to the use and enjoyment of the said jewellery, and (2) whether or not the said Theresa Mabel Barry Wardell, in case it should be held she is entitled to the use and enjoyment of the said jewellery, may alter or in any way change or vary the settings or style of the said jewellery.

1. Yes.

2. She has a life interest in them. She may better but not worsen them, and should not do anything whereby the substantial identity is destroyed. It is impossible to particularise, and Mrs. Wardell will be well advised to keep on the safe side.

(e) Whether or not the cost and expense of keeping the said residence in repair, the payment of the taxes, municipal rates, and the insurance thereon and thereof, is to be borne by and paid by the said Theresa Mabel Barry Wardell, or are the trustees authorised to set aside a sum sufficient to produce a fund to provide for all or any of the said expenses, or by whom and out of what fund are the same payable? Mrs. Wardell has all the duties of a life tenant, amongst them those of repair, etc.; and the trustees have no obligation in the premises.

(f) Whether or not the trustees may sell the said house number 110 Bay street south, Hamilton, and apply the proceeds in purchasing or building another house in the city of Hamilton or neighbourhood in substitution therefor.

The trustees cannot sell without the permission of Mrs. Wardell. If it is desired to sell, the trustees may make a contract with Mrs. Wardell to pay her either the income of the purchase money or a fair rate of interest thereon for her life. The contract may be submitted, after approval by the Official Guardian; and, if no objection is seen to the terms thereof, it will be approved by the Court and an order made for sale, etc.

Costs of all parties will be out of the fund in question.



## [DIVISIONAL COURT.]

SELKIRK V. WINDSOR ESSEX AND LAKE SHORE RAPID R.W. CO.

D. C.

*Company—Electric Railway Company—Powers of Provisional Directors—Special Act 1 Edw. VII. ch. 92, sec. 9 (O.)—General Electric Railway Act, sec. 44—Contract—Sanction of Shareholders.*

1910

May 5.

Section 9 of the special Act 1 Edw. VII. ch. 92 (O.), incorporating the defendant company, enacts that the provisional directors may agree to pay for the services of persons who may be employed by the directors for the purpose of assisting the directors in furthering the undertaking, or for the purchase of the right of way, and any agreement so made shall be binding on the company:—

*Held*, that the express language of the special Act prevails over the general provision (sec. 44) of the Electric Railway Act, R.S.O. 1897, ch. 209, all the clauses of which, except so far as inconsistent, were, by sec. 12 of the special Act, incorporated with and deemed to be a part of the special Act; and, therefore, the provisional directors had power to bind the company by making the contract sought to be enforced, a contract to pay the plaintiffs for services in furthering the company's undertaking.

The special Act, sec. 9, says that this can be done by the provisional directors "when sanctioned by a vote of the shareholders at any general meeting:—"

*Held*, approving and following *McDougall v. Lindsay Paper Mill Co.* (1884), 10 P.R. 247, 252, that the plaintiffs' contract was not affected by the non-observance of this direction; and, apart from that, the contract was approved, before and after it was made, by the whole body of shareholders, though not formally assembled in general meeting.

Judgment of RIDDELL, J., 20 O.L.R. 290, which was in favour of the plaintiffs against the individual defendants, reversed, and judgment directed to be entered for the plaintiffs against the company.

APPEAL by the defendants Newman and Nelles from the judgment of RIDDELL, J., 20 O.L.R. 290.

The action was to recover \$1,000 alleged to have been promised to the plaintiffs by the defendants, or some of them. At the trial judgment was entered dismissing the action as against the railway company without costs, and for the plaintiffs against the defendants Newman and Nelles for \$1,000 and costs.

May 4. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*E. S. Wigle*, K.C., for the defendants Newman and Nelles. These defendants cannot be held liable, as this was a contract which binds the company. By the special Act of incorporation of the defendant company, 1 Edw. VII. ch. 92, sec. 9\* (O.), the

\*9. The provisional directors, or the elected directors, may pay or agree to pay, in paid-up stock or in the bonds of the said company, such sums as they may deem expedient to engineers or contractors, or for the right of way or material, plant or rolling stock, and also, when sanctioned by a vote of the shareholders at any general meeting, for the services of the promoters, or other persons who may be employed by the directors for the purpose of assisting the directors in furthering the undertaking, or for the purchase of right of way, material, plant or rolling stock, whether such promoters or other persons be provisional or elected directors or not, and any agreement so made shall be binding on the company.

D. C.  
1910  
SELKIRK  
v.  
WINDSOR,  
ETC.,  
R.W. Co.

provisional directors may agree to pay for the services of persons who may be employed by the directors for the purpose of assisting the directors in furthering the undertaking. This special Act prevails over any provision in the general Electric Railway Act, R.S.O. 1897, ch. 209, which may conflict with it. Though the agreement was not sanctioned at a general meeting of the shareholders, yet it was ratified by all the shareholders, which, I submit, was sufficient. See Lindley on the Law of Companies, 6th ed., vol. 1, pp. 218, 219; *McDougall v. Lindsay Paper Mill Co.* (1884), 10 P.R. 247, at p. 252; *Fountaine v. Carmarthen R.W. Co.* (1868), L.R. 5 Eq. 316.

A. H. Clarke, K.C., for the plaintiffs. The plaintiffs are entitled to succeed against either the defendant company, or the defendants Newman and Nelles; they are not particular who pays them. See *Collen v. Wright* (1857), 8 E. & B. 647; *Halbot v. Lens*, [1901] 1 Ch. 344.

J. M. Pike, K.C., for the defendant company. The company are not bound by this agreement, and consequently are not liable. No general meeting of the shareholders of the company could be called so as to sanction such as an agreement as this, until the provisions of 5 Edw. VII. ch. 110, sec. 3 (O.), had been complied with, and this had not been done. The contract was not sanctioned by the shareholders at any general meeting, as required by sec. 9 of the Act of incorporation. The defendants Newman and Nelles had, therefore, no power to bind the company by such a contract as this.

*Wigle*, in reply.

May 5. The judgment of the Court was delivered by BOYD, C.:—This case is reported in 20 O.L.R. 290, where all the facts are set forth. We differ with the conclusions of the learned Judge because of a clause in the special Act to which his attention was not directed. He finds that the provisional directors have no power to bind the company, yet unorganised, by making the contract in question as a corporate liability, and therefore places liability for the amount on the two officers who executed the contract, on the ground that they had represented the competence of the company as a matter of fact, and so became answerable in damages to the amount of the bond.

But by the special Act 1 Edw. VII. ch. 92, sec. 9 (1901), the provisional directors may agree to pay for the services of persons who may be employed by the directors for the purpose of assisting the directors in furthering the undertaking, or for the purchase of the right of way, and any agreement so made shall be binding on the company. This special Act provides that the clauses of the general Electric Railway Act, R.S.O. 1897, ch. 209, except so far as they may be inconsistent with the express enactments of the special Act, shall be incorporated with and be deemed to be part of the special Act (sec. 12).

True it is that by the general Act, in the section cited below, ch. 209, sec. 44, provisional directors are not empowered to enter into such contracts as the one now sued on, and under the general Act it would not be binding on the company. But the express language of the special Act is to prevail, which authorises such an engagement.

The special Act says that this can be done by the provisional directors, "when sanctioned by a vote of the shareholders at any general meeting." Upon similar language it was held that a security was not affected by the non-observance of this direction, upon English authorities cited and followed, in *McDougall v. Lindsay Paper Mill Co.*, 10 P.R. 247, 252.

Apart from that, in this case the five persons incorporated and named in the Act were the owners of the company, and were the whole body of shareholders, and these all met and discussed the making of this engagement, and approved of it, before and after it was made—though not formally assembled at a general meeting of the shareholders. They were all the shareholders, and as directors they directed and sanctioned the making of this engagement. Nothing more could be done in the way of substance to comply with the safeguards of the Act, even if they be read as prerequisites.

The judgment should, therefore, be set aside as against the two individual defendants, and judgment entered for the amount of the bond, \$1,000, and interest from the date of payment, against the company, and costs of the plaintiffs and individual defendants should be paid in the Court below and in appeal (but not the costs thrown away in appeal by the failure to bring the company before the Divisional Court when the appeal was first launched).

D. C.

1910

SELKIRK  
v.  
WINDSOR,  
ETC.,  
R.W. Co.  
—  
Boyd, C.

[RIDDELL, J.]

1910

SCHWENT V. ROETTER.

May 6.

*Gift—Money in Bank—Transfer to Joint Credit of Donor and Daughter—Death of Donor—Right of Survivor—Claim of Executor—Interpleader Issue—Evidence—Corroboration—R.S.O. 1897, ch. 73, sec. 10—Costs.*

J.S. and his wife had money deposited in a bank to their joint credit. The wife died; and thereafter J.S. delivered to the bank a written memorandum, addressed to the bank, and signed by himself, as follows: "This is to certify that I transfer this money in my name J.S. and M.S. in our savings bank account number S. 27 in your bank to the joint credit of myself, the sole survivor, and my daughter M.S., to be drawn by either of us." The money lay wholly undisturbed in the bank until the death of J.S., when it was claimed by the plaintiff, one of the executors of J.S., as part of his estate, and by the defendant, the daughter named in the memorandum, as her own:—

*Held*, that the defendant's story, that her father intended that the money should be at the call of either her or himself, and that, if any were left at his death, she should have it all, was corroborated by the document so as to satisfy the requirements of R.S.O. 1897, ch. 73, sec. 10, and should be accepted, as against the evidence of the plaintiff and another witness.

And *held*, notwithstanding the general rule that a parol gift of a chattel without delivery is ineffective, that, in the circumstances, the money was during the joint lives joint property with right of survivorship.

*Re Ryan* (1900), 32 O.R. 224, and cases there cited, followed.

*Talbot v. Cody* (1875), 10 Ir.R.Eq. 138, specially referred to.

*Hill v. Hill* (1904), 8 O.L.R. 710, distinguished.

Interpleader issue found in the defendant's favour; the plaintiff to pay the defendant's costs; those costs and his own costs not to come out of the estate in such a manner as that the defendant would be in fact paying part of them herself (subject nevertheless to the discretion of the Surrogate Judge, when passing the plaintiff's accounts, to allow these costs out of the remainder of the estate.)

AN interpleader issue. The facts are stated in the judgment.

May 3. The issue was tried before RIDDELL, J., without a jury, at Cayuga.

*R. S. Colter*, for the plaintiff.

*W. M. Douglas*, K.C., and *J. A. Murphy*, for the defendant.

May 6. RIDDELL, J.:—John Schwent and his wife Magdalena had money deposited in the Canadian Bank of Commerce at Dunnville to their joint credit. On the 27th April, 1908, the wife died. John Schwent thereupon, on the 22nd May, 1908, delivered a document to that bank in the following terms:—

"The Canadian Bank of Commerce, Dunnville.

"May 22nd, 1908.

"This is to certify that I transfer this money in my name John Schwent and Magdalena Schwent in our savings bank account



number S. 27 in your bank to the joint credit of myself, the sole survivor, and my daughter Magdalena Schwent to be drawn by either of us.

“Witness: W. McDONALD.

JOHN SCHWENT.”

The money lay wholly undisturbed in the bank until the death of John Schwent on the 5th July, 1909. He had on the 25th September, 1900, made his will, whereby he appointed his daughter Magdalena and his son Christian executors (in the will the family name is spelled “Swent” throughout, but there is no question about the identity).

After the death, Christian claimed this money in the bank as being part of the estate; Magdalena, who by this time had married one Roetter, claimed it as her own. The bank was allowed to pay the amount into Court, less their costs, and an issue directed with Christian Schwent as plaintiff and Magdalena Roetter as defendant, to determine the question “which of the said parties is entitled to the above-mentioned sum of money paid into Court by the” bank, amounting now to \$1,285.18. As the plaintiff is executor and the defendant is executrix, it would appear that the plaintiff is not in any event entitled to the money as against the defendant; but no point was made of the form of the issue—and the real question to be decided is, whether the money belongs to the executors of the estate as assets of the estate, or to the defendant as her own private property.

The deceased had one son, the plaintiff, and four daughters, one of them the defendant.

At the trial before me at Cayuga, the plaintiff gave evidence on his own behalf, and called one of his sisters, Malinda Gibson; the defendant offered her own evidence only. I see no reason for disbelieving the plaintiff, who seemed to be straightforward; and the evidence of the defendant was transparently candid and honest and deserves the fullest credit—that of Mrs. Gibson did not recommend itself to me; she seemed to be actuated by much animus against her sister, and I place no reliance upon her testimony, except as hereinafter mentioned.

As the plaintiff must claim in this matter (whether the issue be technically so framed or not) as executor of the deceased John Schwent, I considered that practically all he said, which consisted of statements made by his father at a time far removed from the

Riddell, J.

1910

SCHWENT  
v.  
ROETTER.

Riddell, J.

1910

SCHWENT

v.

ROETTER.

date of the transfer, should be considered self-serving evidence—and therefore should be excluded. But, lest I should be wrong, I thought I should take all this evidence subject to the objection. Still, even if it should be taken, I do not find anything which at all changes the effect of the transfer, or which shews that, at the time of the transfer, the deceased intended anything but the legal effect of the words used, as I find it.

I wholly reject the evidence of Mrs. Gibson, except so far as it shews that the deceased intended the defendant, even during his lifetime, to draw any or all of the money as she thought fit; but, even if her story is to be taken, the conversation with the deceased took place about a month before the transaction in question, and is not sufficient to vary the meaning of the document or to prove to me an intention of her father, adverse to the defendant's contention.

The manner of the defendant was all that could be desired; her candour was manifest; and her story, as given in the witness-box, deserves all credit. But she, too, is in the difficulty that she is "an opposite or interested party to the action," "in an action or proceeding by . . . the executor . . . of a deceased person . . ." and "in respect of" a "matter occurring before the death of the deceased person." And she cannot obtain a judgment on her own evidence "unless such evidence is corroborated by some other material evidence:" R.S.O. 1897, ch. 73, sec. 10.

The material evidence she points to is the document itself—and, if that is material evidence, no doubt it is corroboratory of her story. If I assume that it is such corroboration, then her story must be taken (and I wholly believe her) that her father intended that this money should be at the call of either her or himself, and that, if any were left at his death, she should have it all. That that was the fact there can be no doubt. She is, perhaps, to a slight degree corroborated by Mrs. Gibson also. But, if her evidence cannot be taken, the document itself is to the same effect. While both lived, the money was to be drawn by either; at the death of either, that one ceased to have the power to draw, but that is all.

The plaintiff's case was ably argued by Mr. Colter, and was wholly based upon the doctrine that the gift of a chattel is in-

effective unless delivery is made or a deed given. There is no doubt that "a delivery of possession was as necessary to the transfer of a chattel (at the common law) as a delivery of seizin was to the transfer of a freehold interest in land."

The leading case of *Cochrane v. Moore* (1890), 25 Q.B.D. 57, S.C., 6 Times L.R. 296, contains an elaborate discussion of the principle, and at pp. 72, 73, of the Q.B.D. report, Fry, L.J., says: "According to the old law no gift or grant of a chattel was effectual to pass it whether by parol or deed, and whether with or without consideration unless accompanied by delivery. . . . On that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery." (It seems clear that neither of these exceptions was known till after the 13th century.)

The law as to gifts by parol was laid down in an authoritative form in *Irons v. Smallpiece* (1819), 2 B. & Ald. 551, by the Court of King's Bench, and, though there has been an occasional note of dissent or discontent, this case has been followed in general and is undoubted law.

Pollock & Wright (Possession in the Common Law, p. 198) accurately express the rule thus: "A parol gift without consideration and without delivery passes no rights in the thing, but is merely *nudum pactum*;" and add in the note, "In Roman law *nudum pactum* for want of delivery, in English for want of consideration." This is correct also as the law now is; but, as the common law was originally understood, such a gift would be *nudum pactum* at the English as well as at the civil law for want of delivery.

It would serve no good end to pursue the inquiry—there can be no doubt of the general proposition that a parol gift of a chattel without delivery is ineffective. I do not trace the examples of what has been considered delivery, as, *e.g.*, prior delivery *alio intuitu*, as in *Cain v. Moon*, [1896] 2 Q.B. 283, or change of possession, as in *Kilpin v. Ratley*, [1892] 1 Q.B. 582, and the like. *In re Weston*, [1902] 1 Ch. 680, is also of interest. Nor do I more than refer to *Travis v. Travis* (1886), 12 A.R. 438, and similar cases, because, according to my view, there is express authority in our own Courts covering the very point here involved.

Riddell, J.

1910

SCHWENT  
v.  
ROETTER.

Riddell, J.  
1910  
SCHWENT  
v.  
ROETTER.

In *Payne v. Marshall* (1889), 18 O.R. 488, a wife, having \$2,000 given her by her husband, went with him to the bank and there deposited the money in the name of the two, subject to withdrawal by either. At the husband's death it had not been touched; and the Court (Rose, J.) held that it was the wife's. On appeal, the Divisional Court (Common Pleas Division) affirmed the judgment. This case is not, of course, conclusive of the present, as there the money had been in the manual possession of the wife; and the Divisional Court says (p. 492): "The question . . . arises whether the money being deposited in the manner stated can affect her right to retain the gift;" but on p. 494 the Court says: "Putting the case in the most favourable view possible for the plaintiff, by regarding the money deposited as the property of the husband and wife jointly, on the husband's death the wife was entitled to the whole by survivorship."

In *Re Ryan* (1900), 32 O.R. 224, a man deposited money with the H.S. Co. and caused an account to be opened—"Patrick Ryan and Ellen Ryan jointly (husband and wife) to be drawn by either, or in the event of the death of either, to be drawn by the survivor." The Chancellor held, "It was during the joint lives joint property with right of sole ownership and property to the survivor." It is true that in the *Ryan* case the wife said that money of hers had gone into the fund; but I do not understand that the Chancellor puts his judgment upon that ground.

He speaks with approval of *Low v. Carter* (1839), 1 Beav. 426, in which the husband transferred money of his own in the funds into the joint names of himself and wife, and it was held after his death that the wife was entitled. In that case (p. 427) there was parol evidence that the husband, in a conversation the day before his death, had said that, as this property was in their joint names, he had no occasion to leave it her by will, but I do not find that this fact entered into the decision. Lord Langdale, M.R., at p. 430, says, "The property was transferred into the joint names, for the benefit of the survivor." Even if that conversation be considered to have had weight, the evidence of the defendant in the present case is that the father believed (at least was told) that now there would be no need of a will.

In *Dummer v. Pitcher* (1833), 2 My. & K. 262, the husband transferred two sums in the funds into the joint names of himself



and wife, and subsequently made some further purchases, taking the transfers into their joint names. By his will he dealt with the interest of all his funded property. Notwithstanding this provision of his will, the Court, Sir Launcelot Shadwell, V.-C. (1831, 5 Sim. 35), held that the wife was entitled. She does not seem to have made any disposition of any part of these funds during her husband's lifetime: see 5 Sim. at p. 40; 2 My. & K. pp. 268, 269. The Vice-Chancellor says, p. 43: "There is nothing to shew that the husband intended that the transfers should have any operation but what they legally had." On appeal the Lord Chancellor, Lord Brougham, affirmed the decree, 2 My. & K. 262. At pp. 273 *sqq.* the Lord Chancellor discusses the effect of the deceased retaining power over this chose in action after the transfer and until the time of his death, but has no doubt that the stock survived to the wife.

*Talbot v. Cody* (1875), 10 Ir.R. Eq. 138, seems to be on all fours with the present. There the deceased had for a series of years lodged money in two banks on deposit receipts, some in his own name and others in the joint names of himself and wife; and he frequently changed deposits already made in his own name into their joint names. There was some evidence of statements by him to his wife (but resting, as in the present case, on her own testimony) that he acted thus to enable the survivor to take the principal. It was held by the Irish Master of the Rolls (Sullivan) that "the wife was entitled to the money represented by the receipts in their joint names." He compares it to the case of a man depositing a sum of money with a friend and saying at the time of the deposit, "I want you to hold this money in trust for myself and my wife as joint tenants of it"—the husband dying without getting the money and the wife surviving, it would be clear that the wife was entitled. The Master of the Rolls cites also *Gosling v. Gosling* (1855), 3 Drew. 335, and *Grant v. Grant* (1865), 34 Beav. 623; and distinguishes *Marshal v. Crutwell* (1875), L.R. 20 Eq. 328, shewing that this last was decided upon special circumstances.

In *In re Eykyn's Trusts* (1877), 6 Ch. D. 115, Malins, V.-C., also considers *Marshal v. Crutwell* as decided upon the special circumstances: p. 121.

In *In re Young* (1885), 28 Ch. D. 705, bank accounts were kept in the joint names of husband and wife; the wife, surviving her

Riddell, J.

1910

SCHWENT  
v.  
ROETTER.

Riddell, J.

1910

SCHWENT

v.

ROETTER.

husband five days, was held entitled to the amounts, Pearson, J., being of the opinion that the whole circumstances of the case shewed that it was intended that whichever survived should have the benefit of the investment.

The cases cited by the learned Chancellor with approval are, it seems to me, conclusive of this case, unless they have been in some way overruled. I cannot find that they have been overruled or even questioned. The case which is distinguished, *i.e.*, *Marshal v. Crutwell*, is mentioned incidentally in *In re Whitehouse* (1887), 37 Ch. D. 683, at p. 693, but not on this point; and I do not find that it has since been considered in England. Nor do I find that *Re Ryan* has been questioned in our own Courts.

It would seem that the defendant should succeed, unless there is some difference between the case of a wife and that of a daughter; and such a distinction has not been suggested.

The plaintiff, however, relies upon *Hill v. Hill* (1904), 8 O.L.R. 710. In that case the plaintiff's father owned \$400 on deposit in a bank to his credit. He procured from the bank a deposit receipt for the amount, payable to him and the plaintiff (his son), or either, or the survivor. The understanding between father and son was, that the money should remain subject to the father's control and disposition while living, and that whatever should remain at the death should then belong to the son. The learned trial Judge, Mr. Justice Anglin, does not dispute the binding character of *Re Ryan*, but says (p. 711): "If the deposit receipt stood unexplained, so that I might treat its form as truly evidencing the substance of the transaction . . . the plaintiff's contention might be sustained on the authority of such cases as *Payne v. Marshall* . . . and *Re Ryan*. . . . But, upon the plaintiff's own evidence, I find myself driven to the conclusion that the purpose of . . . deceased was by this means to make a gift to . . . the plaintiff . . . in its nature testamentary. . . . The father retaining exclusive control and disposing power over the \$400 during his lifetime, the rights of the son were intended to arise only upon and after his father's death. This is, in substance and in fact, a testamentary disposition of the money, and, as such, ineffectual." The learned Judge consequently held the son not entitled—but the distinction between that case, on the one hand, and *Re Ryan* and the present, on the other, is the exclusive control for life of the deceased.

I do not think it necessary to consider the effect of the deceased making the defendant an executor, as to which *In re Griffin*, [1899] 1 Ch. 40S, is of interest.

I think the plaintiff wholly fails, and the issue must be decided in the defendant's favour, not only in form but also in substance.

Apparently there is no necessity for another action, as Con. Rule 1114 gives the trial Judge the power to dispose of the interpleader proceedings. It will, however, be sufficient to adjudge that the defendant has succeeded in the issue.

As to costs, the defendant should have them, and the plaintiff should pay them. He should not pay them out of the estate in such a manner as that the defendant would be in fact paying part of them herself. By the will he receives the farm, 100 acres, subject to a bequest to the wife and the payment of certain legacies. The wife died before the husband, so that her bequest lapsed; in this lapse is included also personal property of the deceased, which, in the event which has happened, will go as on an intestacy. To one-fifth of this the defendant is entitled; and she should not be made to pay any of the costs of contesting her claim. There may be circumstances which justify the plaintiff being reimbursed by the remaining portion of the estate—these circumstances, if any, the Surrogate Judge can, and no doubt will, take into consideration in passing the accounts of this executor and fixing his remuneration; and the direction now made will not prejudice the right of the Surrogate Judge so to do. Consequently, in directing the plaintiff to pay the costs of the defendant, and in declining to direct that the plaintiff's own costs be paid out of the estate, the discretion in that regard of the Surrogate Judge will not be interfered with.

---

Riddell, J.

1910

SCHWENT  
v.

ROETTER.

## [DIVISIONAL COURT.]

D. C.

BENNETT V. HAVELOCK ELECTRIC LIGHT AND POWER CO.

1910

Jan. 7.  
May 5.

*Company—Sale of Property to Company by Director—Agreement with Co-directors—Secret Profits—Fraud on Future Shareholders—Class Action—Account of Profits—Laches—Liability—Form of Judgment—Costs—Lien—Salvage.*

A trustee cannot make a profit for himself without the full knowledge of all his *cestuis que trust*, and so the directors of a company, when it is intended to sell stock, stand in a fiduciary relation not only to those who are members at the time but to all who may come in afterwards.

*In re Hess Manufacturing Co.* (1894), 23 S.C.R. 644, *In re British Seamless Paper Box Co.* (1881), 17 Ch.D. 467, and *In re Canadian Oil Works Corporation, Hay's Case* (1875), L.R. 10 Ch. 593, specially referred to.

The five promoters of a company, who were the only shareholders, as shareholders and directors, assented to the purchase of property from one of them for the company for \$5,000, and each of the other four received from the vendor a cheque for \$1,000, which was applied in payment of the liability of the four to the company for stock subscribed. The exact nature of the agreement did not appear from the evidence, but it was clear that each of the four received \$1,000 from the vendor, and that that fact was not disclosed to the shareholders who had been or were thereafter invited to take stock in the company:—

*Held*, in an action against the five original shareholders and the company, brought by two persons who afterwards became shareholders, that the four had received a secret profit for which they must account to the company. As the conduct of the four was fraudulent, a class action was maintainable; and the right to compel the defendants to account for the advantage so received could not be lost by any delay short of the appropriate statutory limitation.

*Held*, also, that the judgment should direct that the money be paid into Court, and that the plaintiffs should have a lien upon it for their costs, as between solicitor and client, properly incurred, on the principle of salvage, in creating the fund for the company.

Judgment of BRITTON, J., reversed.

THIS action was brought by two shareholders in the defendant company for the cancellation of 200 shares of stock allotted by the defendant company to the other defendants; or to set aside the sale of certain property by the defendant Mathieson to the defendant company; or for payment by the defendants other than the company for the stock received by them; and for an account of secret profits retained by them as the result of a fraudulent scheme for acquiring certain land from the defendant Mathieson which he had purchased at a much smaller price than that received from the defendant company. The facts appear in the judgments.

November 22, 23, 24, 1909. The action was tried at Peterborough before BRITTON, J., without a jury.

D. O'Connell and G. N. Gordon, for the plaintiffs.



*S. T. Medd*, for the defendant company.

*E. G. Porter*, K.C., for the defendants Holcroft and Rose.

*W. F. Kerr*, for the defendants Bryans and Curtiss.

*R. Ruddy*, K.C., for the defendant Mathieson.

D. C.

1910

BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.  
Britton, J.

January 7, 1910. BRITTON, J.:—The defendant Mathieson, in the autumn of 1902, or early in 1903, was interested in having the village of Havelock lighted by electricity. He had his eye upon property, viz., lot 19, 6th concession B of the township of Belmont, with the right of flooding lot 19 in the 7th concession of the same township. Mathieson talked with people of his plan, but could not at first get any one to join him in his project. He was, however, advised to buy the property, and in February, 1903, he did buy it for \$300. It was stated, and not denied, that he offered the property to the corporation of Havelock for the same as he paid for it. Nothing came of this offer, and he then attempted to interest others. Apparently there was no secret as to what Mathieson wanted or what he was working for, or the property he had purchased, or the price paid by him.

It was, in my opinion, quite true that Mathieson was willing to give up his bargain to any one who could and would develop power, put up and operate an electric light plant in Havelock. He got into communication with the defendants Rose, Bryans, Holcroft, and Curtiss. Rose and Holcroft—perhaps also the others—made inquiries with Mathieson as to probable customers in the event of plant for lighting being installed; also as to persons likely to take stock. As a result the five persons named determined to form a company, and Mr. Hall, a solicitor, was employed to obtain a charter. A brother of Rose had examined the property, and he estimated the cost of plant, exclusive of the property Mathieson owned, at \$15,000. At this early stage I think it was understood in some way by all five that, if a company was formed, and if Mathieson's property was put in, it was to be at \$5,000, to be paid for in stock of the company. The agreement on which the application for the charter was made was signed by the five, and the proposed capital was \$20,000, divided into 800 shares of \$25 each—\$15,000 cost of plant and \$5,000 for cost of land and water power would make the \$20,000. I do not think it was a mere coincidence that Mathieson afterwards sold for \$5,000. A charter

D. C.  
1910  
BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.  
Britton, J.

was obtained by the five, of whom three, namely, Bryans, Mathieson, and Holcroft, were provisional directors. The charter is dated the 21st March, 1903. When the charter issued, the only stock-holders were the five persons named. They, in the agreement, had subscribed for and agreed to take 10 shares each, \$250 each, \$1,250 in all. Then there was some canvassing for stock, but up to the 4th May, 1903, no person, other than the five, had subscribed for any, and the five were the only shareholders. There was very little money paid in, but the company, "subject to the provisions of the Act respecting companies for supplying steam, heat, electricity or natural gas for heat, light or power," was authorised and empowered "to construct, maintain, complete and operate works for the production, sale and distribution of electricity for the purposes of light, heat and power." The company, therefore, had power to purchase property necessary for carrying on their work. I am of opinion that it was understood by the five from the time of obtaining the charter down to the 4th May that Mathieson's property was to go to the company for \$5,000, to be paid for in stock. The solicitor who, for the five, applied for the charter, was not called, but it is clear from the evidence that it was understood by the five that the sale of the property, if made, must be so made as to be in fact, or in form, a cash transaction. In preparation for a meeting which was to take place, an agreement had been prepared for the sale of this property for \$5,000, stated to be in cash.

Mathieson says he was willing, rather than have electric lighting of Havelock fall through, to sell to the company for \$300, but that his associates, or some of them, were told that the only way he, or the five, could get anything out of it, was to do what was done, and as, at that time, only the five were interested, he did not think there was anything wrong in what was proposed.

Up to the 4th May, 1903, there is little conflict in the testimony. As to what took place on and after the 4th May, Mathieson differs entirely from the other four. On the 4th May there was a meeting, the minute book records it as a meeting of the provisional directors, but all five were present, taking part more or less in the proceedings. By-laws were passed, both general and special. The agreement with Mathieson was the subject of a special by-law. It was confirmed, and the agreement was executed

by the president and secretary, and the corporate seal of the company was affixed. The account that Mathieson gives of the agreement and of the fixing of the price is corroborated by the minutes, and I must think that the memory of the other witnesses is at fault. Immediately after the meeting of the provisional directors the meeting of the same persons as shareholders was held. The record of that meeting is that each of the five named held 50 shares; that was not so in fact; and such a record could only be made upon the assumption that they would be the holders of 50 shares each upon the carrying out of what was distinctly understood, if not expressly agreed, between them, namely, that 200 shares were to be allotted for Mathieson's property, of which each of the five was to get 40 shares, and these 40, together with the 10 each had originally subscribed for, would make the 50 as recorded. The five, as shareholders, and all the shareholders, at their meeting as such, confirmed all that had been done by the meeting, so called, of the provisional directors.

The next chapter in these proceedings is what occurred on the 15th May. The parties all met at the Sovereign Bank at Havelock on that day. What really took place was as follows—although possibly not in the order in which I give it. The company, having no account with the Sovereign Bank until at the time of the meeting there, and there being no money to the credit of the company, gave a cheque to William Mathieson for \$5,000. This was placed by the bank to the credit of Mathieson. Mathieson then gave four cheques of \$1,000 each to each of the other four, and each deposited his cheque to his own credit, and then each of the five gave a cheque to the company for \$1,000, for 40 shares of stock. The company deposited these five cheques, giving them a credit of \$5,000, which credit was cancelled by their cheque to Mathieson of \$5,000. Mathieson put his cheque on deposit, \$5,000, wiped out by five cheques, four to his four associates and one for stock—\$5,000. Each of the four put to his credit the \$1,000 and drew it out by a cheque for stock, \$1,000. All this financing, by giving cheques and opening and closing accounts to the extent of \$5,000 for the land and \$5,000 for stock, took place when, as a matter of fact, the only money these five persons had, all told, in the Sovereign Bank, at that agency, was the sum of \$272.29, of which Holcroft had 60 cents, and Bryans \$271.69. The company, Mathieson, Rose, and Curtiss had no money.

D. C.  
1910  
BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.  
Britton, J.

D. C.

1910

BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER CO.

Britton, J.

Why was a meeting at the bank necessary at all if it was agreed between them that each should do his own financing and pay in cash for his own stock? One of the witnesses said that when Mathieson got his cheque for \$5,000 the bank manager said: "Do you want the money for it? You can have it if you do." I do not believe anything of the kind took place. It was simply a matter of bookkeeping, and it was in accordance with the original understanding, and because of the belief that stock could not be allotted in payment for the property bought by Mathieson for \$300, and transferred to the company at the price of \$5,000.

Mathieson says that, in addition to the stock, he got his \$300 back—\$75 from each of his associates. They deny that they paid Mathieson. As between them, I think Mathieson was in some way paid that. The company paid only the \$5,000, and that by allotting the stock.

I cannot accept the story at all as told by the four that at the bank on the 15th May there was a sudden realisation by Mathieson that he could not finance the undertaking, as they say he had agreed to do, and the equally sudden decision of the four that they could and would finance it for a consideration, and that the consideration should be \$1,000 cash to each out of the \$5,000 cash which they say Mathieson had to his credit.

To summarise, I find the facts, and upon these findings base my decision, realising that the case presents points of nicety and difficulty:—

(1) Mathieson did not purchase the property as trustee for any person or persons individually or for any company or persons to form a company, or for any company to be formed.

(2) After Mathieson purchased, there was an understanding or agreement, not in writing, between Mathieson and the four individual defendants, that a company should be formed, and, if that company should be formed, and should purchase the property, he was willing to give to each of the other four one-fifth of the purchase price, all to get stock in the company in lieu of cash for the property.

(3) There was no binding agreement on the part of Mathieson to sell, or on the part of the company to buy, until the 4th May, 1903.

(4) Upon the evidence, the sum of \$5,000 was not an extrava-



gant or exorbitant amount to ask for the property. Apart from the fact that the purchase price was only \$300, there was no evidence that the property was not actually worth \$5,000 for the purposes of the company.

(5) The sale to the company was at a time when the plaintiffs were not shareholders, and when there were no other shareholders or any persons interested, other than the five persons named as defendants.

(6) There was no disclosure to the plaintiffs, prior to their subscribing for stock, of the real arrangement between Mathieson and his co-defendants as to the purchase of Mathieson's property. The conveyance of the property stated the consideration as \$5,000. It really made no difference to the shareholders whether these men paid \$5,000 in money, which money was handed over to Mathieson, or the stock was issued as the consideration for the conveyance of the land.

(7) After the conveyance of the land and after the company had taken possession and work had been done for installing the plant for operation, some persons characterised the stock of the defendants as "watered stock," and then the four defendants asserted payment in cash for the stock they held, when in fact the transaction was as I have mentioned.

(8) I am of opinion that no fraud was intended. Very likely the five were advised to carry through the transaction as apparently for cash, to get over the difficulty of directors of the company voting in a matter in which they were personally interested.

Upon these facts, have the plaintiffs any remedy in this form of action? What are the plaintiffs' strict rights? The company is a going concern, and, so far as a company can express its wish in such a matter, does not desire cancellation, or that the plaintiffs shall succeed in this action. The property acquired is not only the best, but is the only, property that as water power can be acquired for the very useful purpose for which the company was incorporated. The plaintiffs did not assert any right in themselves to redress a wrong to them by reason of any deceit practised upon them. The suit is for an alleged wrong done to the company; therefore the action should *prima facie* be brought by the company itself. The exception to the rule is given in *Burland v. Earle*, [1902] A.C. 83, at p. 93: "Where the persons against whom the relief is

D. C.

1910

BENNETT  
v.HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.

Britton, J.

D. C.  
1910  
BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.  
Britton, J.

sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company." It was not shewn here that at the time of the commencement of this action these defendants held or controlled the majority of the shares.

The many cases cited upon this point by counsel for the plaintiffs have this distinguishing feature, that the impeached directors had the controlling power in the company and did not assent to an action being brought by the company.

By the stock book it appears that 385 shares of stock had been subscribed. If, of that, the five defendants actually held at the time of the commencement of the action the 250 shares, *i.e.*, 10 shares originally subscribed by each and the 40 shares allotted in payment of the property, they, of course, held a majority of the shares, but the defendants had sold, and it was not clearly shewn what the holding of each was at the time of the commencement of this action. That was not shewn probably because the plaintiffs were in difficulty as not having taken any formal steps to get the directors to allow an action to be brought in the name of the company. The company was never asked to bring an action. But suppose the plaintiffs are within the exception, and so right in bringing the action in their own names, on behalf of other shareholders, can they succeed in this case? I again quote from *Burland v. Earle*, cited above: "Allowing the shareholders complaining to bring an action in their own names . . . is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company:" p. 93.

I am of opinion that what was done at the meeting of the 4th May, 1903, was capable of being confirmed by the majority of the shareholders, when what had been done was complained of, and as already intimated, these acts were not of a fraudulent

character. The company has approved of all that has been done, and has ratified it in the most formal way. A special general meeting of the shareholders, duly called, was held on the 17th May, 1909, for the purpose of considering, among other matters, all things appertaining in any way to the acquiring and purchase by the company of the Mathieson property. The plaintiff Bennett was present at the meeting and took part in the proceedings. There was no protest that the meeting was not properly constituted or that it was not fully advised; but, on the contrary, after discussion, ratification was carried by a vote of 122 shares for and 50 shares against. It was argued that the four defendants controlled the meeting. There can be no objection to legitimate control by the holders of majority stock. In this case the ratification was carried by votes outside of the impeached shares. These were not voted.

I am of opinion that, upon the merits, the plaintiffs fail. They ought not to succeed merely because the defendants, other than Mathieson and the company, gave an entirely different version from what I think was the true one of the real understanding and agreement with Mathieson. There was not any conspiracy on the part of the defendants to defraud the company or any incoming shareholder.

As to laches. The plaintiff Bennett subscribed for his shares in 1903. He obtained his certificate on the 12th March, 1904. He heard rumours of "watered stock" from time to time, and he had all the information which he possessed at the trial, as early as the 17th March, 1908. On that date he attended a general meeting of shareholders, and knew everything to which he now objects. At that meeting he told Holcroft and Rose that he had no objection to their holding and receiving dividends upon the stock in question, but he said they were not to vote upon that stock.

The plaintiff Nolan subscribed for his stock in 1903. He attended the meeting of shareholders in 1904, and then heard it alleged that the five individual defendants held \$5,000 worth of stock not paid for. He also heard rumours as to what he now complains of. He attended the general meeting of shareholders in 1905, and then voted for Holcroft, Mathieson, and Rose as directors. I think he said he attended all the general meetings of 1906, 1907,

D. C.

1910

BENNETT

v.

HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.

Britton, J.

D. C.  
1910  
BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER CO.  
Britton, J.

1908, and 1909, and at each of these, in some form or other, the matter of "watered stock" was brought up for discussion.

This action was not commenced until the 28th March, 1909.

The plaintiffs have been guilty of laches.

For the reasons given, the action should be dismissed, but it will be without costs.

From this judgment the plaintiffs appealed.

May 2, 3, 4, 1910. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*D. O'Connell*, for the plaintiffs. The defendants, as directors, stood in a fiduciary relation to the company, whose interests they were bound to protect; they were trustees for the future shareholders, and could not make secret profits or accept a bribe from a promoter to assist a promoter in selling to the company; and where a promoter sells to a company property which he acquired, he must make full disclosure: *Lydney and Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85; *Gluckstein v. Barnes*, [1900] A.C. 240, especially at p. 257; *In re Hess Manufacturing Co.* (1894), 23 S.C.R. 644; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918; *Ladywell Mining Co. v. Brookes* (1886), 34 Ch. D. 398; *In re Coal Economising Gas Co., Gover's Case* (1875), 1 Ch. D. 182; *In re Caerphilly Colliery Co., Pearson's Case* (1877), 5 Ch. D. 336, at p. 342; *In re Olympia Limited*, [1898] 2 Ch. 153, especially at pp. 165, 166; *In re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322, especially at pp. 337, 341; *Bagnall v. Carlton* (1877), 6 Ch. D. 371, especially at p. 385; *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221; *In re Canadian Oil Works Corporation, Hay's Case* (1875), L.R. 10 Ch. 593. The plaintiffs rightfully brought the action in their own names, as, the defendants having control of the stock, the company's consent to bring the action in the company's name could not be obtained: *Burland v. Earle*, [1902] A.C. 83, especially at p. 93; *MacDougall v. Gardiner* (1875), L.R. 20 Eq. 383. The plaintiffs were not guilty of laches. The writ was issued in 1908. The learned trial Judge believed Mathieson's statement of the transactions, while the defendants deny its truth. Therefore, there was no disclosure even yet, and consequently there could be no laches. See Encyc. of the Laws



of England, 2nd ed., vol. 1, p. 129; *DeBussche v. Alt* (1878), 8 Ch. D. 286.

*E. G. Porter*, K.C., and *W. S. Davidson*, for the defendants *Holcroft and Rose*, and *S. T. Medd*, for the defendant company. The defendants acquired their interest in the property before the company was formed, and independently of the company. Therefore they were joint owners, and not trustees: *Highway Advertising Co. of Canada v. Ellis* (1904), 7 O.L.R. 504. These joint vendors, afterwards becoming directors, were not liable to disclosure: *Salomon v. Salomon*, [1897] A.C. 22; *In re Ambrose Lake Tin and Copper Mining Co.* (1880), 14 Ch. D. 390; *Ladywell Mining Co. v. Brookes*, 34 Ch. D. 398; *In re Lady Forrest (Murchison) Gold Mine Limited*, [1901] 1 Ch. 582. See also *Hood v. Eden* (1905), 36 S.C.R. 476; *In re Innes and Co. Limited*, [1903] 2 Ch. 254. As there had been no fraud, and as the defendants had not control of the stock at the commencement of the action, and as there had been no request by the plaintiffs to bring the action in the name of the company, the plaintiffs could not maintain the action as at present constituted: *Burland v. Earle*, [1902] A.C. 83; *In re Coal Economising Gas Co., Gover's Case*, 1 Ch. D. 182; *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56; *MacDougall v. Gardiner*, L.R. 20 Eq. 383; *McMurray v. Northern R.W. Co.* (1875), 22 Gr. 476; *White's Treatise on Canadian Company Law*, sec. 11; *Weatherbe v. Whitney* (1897), 30 N.S.R. 49. There was sufficient notice to all who desired to come in as to how much had been paid for the property; and any persons so desiring were in duty bound to inquire before subscribing. If there was misrepresentation, their proper remedy was for rescission of the contract. The plaintiffs were barred by their laches.

*R. Ruddy*, K.C., for the defendant *Mathieson*, submitted that the plaintiffs had failed to shew fraud, which they would have to do in order to succeed. So far as *Mathieson* was concerned there was every disclosure.

*W. F. Kerr*, K.C., for the defendants *Bryans and Curtiss*. The plaintiffs' laches is fatal to their chances to succeed against these defendants, because the latter cannot now be restored to their original status—the more so, that they were not in the beginning made parties, and conditions had in the meantime changed: *In re Hess Manufacturing Co.*, 23 S.C.R. 644; *Allcard v. Skinner*

D. C.

1910

BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER CO.

D. C.

1910

BENNETT

v.

HAVELOCK

ELECTRIC

LIGHT

AND

POWER CO.

(1887), 36 Ch. D. 145; *Faulds v. Harper* (1886), 11 S.C.R. 639. There was no fraud on the part of these defendants, and the company ratified all that was done.

*O'Connell*, in reply. The defendants up to the 4th May, 1903, never had an interest in the property. Mathieson was the sole purchaser. Therefore, they were not vendors of their own property to the company. If the defendants were vendors, they should not have sold without disclosure; if not, they received a bribe, and so committed a fraud.

May 5. MIDDLETON, J.:—What appears to be the real point in this case does not seem to have been presented to and is not considered by the learned Judge whose decision is now in review.

When the property was conveyed by Mathieson to the company for \$5,000, there was some understanding or agreement by which a secret profit was provided for the promoters. They each received from him a cheque for \$1,000, which was applied in payment of the liability of the respective promoters to the company for stock subscribed. The exact nature of the agreement cannot readily be made out from the confused, contradictory, and in some particulars incredible statements of the different parties concerned. This much is clear, each received this sum from the vendor Mathieson, and there was no disclosure of that fact to the shareholders who had been or were thereafter invited to take stock in the defendant company. No stock had been, at the date of the transaction in question, subscribed, but it was from the outset understood that the public were to be invited to subscribe, and it is not clear when the actual canvass was undertaken. This is such misconduct on the part of these defendants as to render them liable to account for the money received.

The language of Strong, C.J., in *In re Hess Manufacturing Co.*, 23 S.C.R. 644, at p. 659, is in point. There he points out the effect of an agreement by which the company purchases property and "part of the price which has been paid by the company finds its way in pursuance of some secret arrangement between the vendor and the promoter into the hands of the latter, that is a secret profit which the promoter, who in such a supposed case has put himself in the position of an agent for the company, cannot retain. . . . In this hypothetical case there would be no contract to rescind; that would not be the appropriate relief; and

although the company might not be in a position to ask for rescission (of the contract) . . . it would still be entitled to compel the promoter to account for and repay his secret profit."

These defendants by their counsel seek to put the case upon the footing that they had themselves acquired an interest in the property and were in truth "vendors." This is in conflict with the weight of evidence and the oath of the defendants themselves, and I do not feel inclined to sanction the adoption of a theory which will not free them from liability, but will make their conduct appear, if possible, still more discreditable.

It may be, and probably was, the fact that the defendants failed to realise that their conduct was objectionable. Probably their position was well put by one of their counsel: "They could not be expected to go in unless there was something in it for them." The desire to make money, while the root of the evil in this case, is not the gist of the offence. The real offence is the receiving of this money while occupying a fiduciary position, and the concealing of the benefit received from those whose interests they were bound to protect. It would be well for those who accept positions of public or quasi-public trust to realise that they cannot, while occupying such positions, receive any personal advantage without the fullest possible disclosure to and assent of all concerned. It has been argued in this case that the defendants are not liable, as they were in fact the only shareholders of the company at the time of the transaction, and because they, as shareholders, assented to what was done. This ignores the fact that, when there is intended to be an invitation to others to come in and take stock, the future shareholders are entitled to the protection of an absolutely independent directorate and to full disclosure of the actual facts. There is no distinction between the position of promoters and directors in this respect; if any can be drawn, it must impose a more stringent obligation upon one occupying the position of director. The principles laid down in the decided cases accord with the dictates of honesty and fair play.

In *In re British Seamless Paper Box Co.* (1881), 17 Ch. D. 467, Jessel, M.R., says (p. 471): "If promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors

D. C.

1910

BENNETT

v.

HAVELOCK

ELECTRIC

LIGHT

AND

POWER Co.

Middleton, J.

D. C.  
1910  
BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.  
Middleton, J.

is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and, of course, it makes no difference whatever that the persons who, at the time the allotment was made, were in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees." In that case the transaction was found to be honest, and there was no liability on the part of the directors or promoters, because there was no intention to issue any stock to any other than the original promoters, who were all acquainted with the real transaction and assented to it—"the subsequent allotment of a portion of the shares not being part of the scheme originally contemplated." Upon appeal time is made the crux of the case. "The directors were, and intended to be, thoroughly honest, and they were, and intended to remain, the sole proprietors of the property of the company and the sole members of the company, and whatever arrangements they chose to make among themselves as to the division of the property concerned themselves alone. . . . When anything like a bonus has been given to directors, and it is called in question by allottees of shares, the burden of proof is thrown on those who have received it, to satisfy the Court that it was intended to be and was in fact honestly received. If they were intending, although then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the Court would, I feel no difficulty in saying, as Lord Langdale did in *Society of Practical Knowledge v. Abbott* (1840), 2 Beav. 559, that they intended to commit a fraud:" *per* James, L.J., pp. 476, 477. "The kind of misfeasance charged in this case is that these directors, who were assuming to act on behalf of a company for purchasing a patent, had themselves an interest in the patent and contrived to get an advantage for themselves, and that they intended to keep this advantage secret from the members of the company for whom they were assuming to act. If so, there was, no doubt, a fraud. If when parties are promoters of a company and then become directors, and at the time when they are making a profit to themselves are intending to act not only for the then members of the company but for future members, and they keep it secret, they can be made to account by future share-



holders. . . . But if at the time when they entered into the transaction they really intended that everybody should be made acquainted with what was done, or if they only intended to act for themselves and for others who knew all about the matter, that does away with all fraud:" *per* Brett, L.J., p. 477. "If this had been an ordinary company in which there was an intention to admit new members and offer the shares to the public, the official liquidator would have been entitled to call on the directors to account for the value of their shares. But on what principle? It is that the directors stand in a fiduciary relation to the whole company, that is, not only to the existing members but to all whom they intend to bring in. A trustee cannot make a profit for himself without the full knowledge of all his *cestuis que trust*, and so the directors of a company formed in the ordinary way stand in a fiduciary relation not only to those who are members at the time but to all who may come in afterwards:" *per* Cotton, L.J., pp. 478, 479.

These principles, so clearly expressed in the passages cited, are also laid down in many subsequent cases, *e.g.*, *Re Leeds and Hanley Theatres*, [1902] 2 Ch. 809; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, especially *per* Lindley, M.R., at p. 432 *et seq.*

The cases referred to on the argument of *Hood v. Eden*, 36 S.C.R. 476, and *In re Innes & Co. Limited*, [1903] 2 Ch. 254, are in no way in conflict with this, as in them, as well as in the case in 17 Ch. D., there was no intention to sell stock. The same principle is recognised in *Salomon v. Salomon*, [1897] A.C. 22, 33, and in *Gluckstein v. Barnes*, [1900] A.C. 240, 249.

As the conduct of the directors in receiving their secret advantage was fraudulent, a class action can be maintained: *Burland v. Earle*, [1902] A.C. 83, 93; and the right to compel the defendants to account for the advantage so obtained cannot be lost by any delay short of the appropriate statutory limitation.

The appeal should be allowed with costs as against the defendant directors other than Mathieson, and judgment should be entered against them severally for \$1,000 and costs subsequent to the date of the amendment. As to Mathieson, the action and appeal should be dismissed without costs. The judgment should direct that the money be paid into Court, and the plaintiffs should

D. C.  
1910  
BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.  
Middleton, J.

D. C.  
1910  
BENNETT  
v.  
HAVELOCK  
ELECTRIC  
LIGHT  
AND  
POWER Co.  
Middleton, J.

be given a lien upon it for the amount of their costs, as between solicitor and client, properly incurred in this action, over and above party and party costs, and for so much of the party and party costs as may not be recovered under the personal order; and, subject to this, the money when recovered should be paid out to the company.

No order is made as to the costs of the company.

In taxing costs for which a lien is given above, the officer will bear in mind that the principle applicable is one of "salvage," and will not allow the costs of any proceeding which did not go to create this fund for the company.

BOYD, C.:—I fully agree with the judgment of my brother Middleton, and it is not needful to add anything to what he has said. This only I would remark, that the *modus operandi* in this case appears to me to be identical with that adopted in *In re Canadian Oil Works Corporation, Hay's Case*, L.R. 10 Ch. 593, and the arguments used by the Solicitor-General, Sir J. Holker, and his associates, unavailingly, in support of the transactions are such as were advanced before us by the respondents. These arguments place the transaction in the most favourable light, but the Court regarded the form as only an ingenious device by which directors were dealing with the promoter so as to obtain some personal benefit without being found out. The diverse aspects of this case presented in the evidence of the different actors shews that, in whatever garb, the real outcome was a secret profit gained by the trustees at the expense of future shareholders. As to the form of action, see also *Hichens v. Congreve* (1828), 4 Russ. 562.

LATCHFORD, J.:—I agree.

---

## [DIVISIONAL COURT.]

## RUSHTON V. GALLEY.

D. C.

1910

May 6.

*Way—Private Lane—Dedication—Acceptance by Municipality—Sidewalk Placed and Repaired by Owner of Adjoining Property—Tacit Permission of Municipality—Duty of Owner—Injury to Person Lawfully Using Sidewalk—Defect—Liability—Negligence—Contributory Negligence—Jury—Absence of Knowledge—Constructive Notice.*

About forty years before action, G. laid out a lane in a city between building lots of his own on either side, leading eastward from a street, but blind at the east end. This lane had ever since been open. There was no formal dedication to the city, but the city had put a gas main, two gas lamps, a water main, and a hydrant upon the lane. The city had not assessed the lane; and it was apparently considered in all respects, save one, as a city street. But G. built a sidewalk upon the lane, after what he considered dedication, and also repaired it from time to time as required. In 1896 G. gave the property to his wife, the defendant, but continued to look after it for her. On the 22nd October, 1908, a person drove upon this sidewalk and broke it, but neither the defendant nor her husband knew this until after the plaintiff was injured on the 24th October. The plaintiff, thinking the lane was open at the east end, drove along it towards the east, and, having some trouble with his horse, jumped out upon the sidewalk at the point where it had been broken, and was injured. The part of the sidewalk which was broken had been put in by G. since the transfer to the defendant.

In an action for damages for the plaintiff's injuries the jury negatived all negligence except the failure to repair from the 22nd to the 24th October, which they found to be negligence:—

*Held*, that G. intended to dedicate the lane, and the city accepted the dedication, long before the defendant became owner of the property adjoining; the lane was, therefore, a public highway, the plaintiff was properly there, and there was nothing in his act in leaping upon the sidewalk in itself wrong; and the rights of the parties depended upon the duty of the defendant in respect of the sidewalk.

Although the defendant did not prove any express permission or license from the city to place or repair the sidewalk, sufficient appeared to shew that the city tacitly licensed and permitted what was done; the private liability to repair was co-extensive with that of the city, and not more onerous; there must be ordinary care and diligence—an absence of negligence; and the finding of the jury of negligence in not repairing within two days, a time which would not justify a Court in inferring notice, could not be allowed to stand.

Judgment of LATCHFORD, J., dismissing the action, affirmed.

APPEAL by the plaintiff from the judgment of LATCHFORD, J., dismissing the action.

The following statement of the facts is taken from the judgment of BRITTON, J.:—

The plaintiff on the 24th October, 1908, met with an accident by stepping, as he alleges, into a hole in a defective sidewalk at what is called "Madeira place," being an open space extending easterly from Parliament street, in the city of Toronto. The plaintiff alleges that the defendant is the owner of Madeira place, that it is open to the public, and that the defendant was guilty of negligence in allowing this sidewalk to become and to continue

D. C.  
1910  
RUSHTON  
v.  
GALLEY.

out of repair, so much so that, by reason of its bad condition, the accident happened to the plaintiff.

The action was tried by LATCHFORD, J., and in part by a jury. Questions were submitted to and answered by the jury as follows:—

(1) When did the defendant, or her husband, first have knowledge of the hole in the sidewalk? A. Saturday night.

(2) When did the sidewalk become out of repair? A. Thursday.

(3) Of what negligence, if any, was the defendant guilty? A. The defendant was negligent in not repairing the sidewalk, having sufficient time to do so before the accident.

(4) Could the plaintiff by the exercise of reasonable care have avoided the accident? A. No.

The jury assessed the damages at \$1,000.

The Thursday mentioned was the 22nd October, 1906.

April 5. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*John MacGregor*, for the plaintiff. The defendant is liable. Madeira place was never assumed for public use as a highway by the city corporation, within the meaning of sec. 607 of the Municipal Act, 3 Edw. VII. ch. 19 (O.). The learned trial Judge erred in finding that there was assumption by the city corporation, and the verdict of the jury should stand. But, even if it were a public highway, the defendant, by interfering with it, rendered himself liable to repair: *The King v. Kerrison* (1815), 3 M. & S. 526; *The King v. Inhabitants of Lindsey* (1811), 14 East 317; *The King v. Inhabitants of Kent* (1811), 13 East 220; Pratt & Mackenzie's Law of Highways, 15th ed., pp. 64, 78; *Rex v. Skinner* (1805), 5 Esp. 219; *Hopkins v. Town of Owen Sound* (1895), 27 O.R. 43; *Holland v. Township of York* (1904), 7 O.L.R. 533; *Ferrand v. Milligan* (1845), 7 Q.B. 730; *Steel v. Prickett* (1819), 2 Stark. 463; *Corby v. Hill* (1858), 4 C.B.N.S. 556; *Hubert v. Township of Yarmouth* (1889), 18 O.R. 458; Biggar's Municipal Manual, p. 640; *Healey v. Corporation of Batley* (1875), L.R. 19 Eq. 375; *Mackett v. Commissioners of Herne Bay* (1876), 35 L.T.R. 202. Whether the way were dedicated or not is a question for the jury. Mere user by the public, no matter how long continued, will not shew a dedication: 13 Cyc. 483; *Dunlop v. Township of York* (1869), 16 Gr. 216.



*H. H. Dewart*, K.C., and *F. J. Dunbar*, for the defendant. There was an assumption of Madeira place by the city corporation as a public highway, and therefore the defendant is not liable, and the learned trial Judge was right in dismissing the action: *Bliss v. Boeckh* (1885), 8 O.R. 451; *Pratt & Mackenzie's Law of Highways*, 15th ed., pp. 31, 33; *Holland v. Township of York*, 7 O.L.R. 533; *Madill v. Township of Caledon* (1901), 3 O.L.R. 66; *Township of Gloucester v. Canada Atlantic R.W. Co.* (1902), 3 O.L.R. 85, 4 O.L.R. 262. If Madeira place is a highway, the plaintiff cannot recover against the defendant, because the way was not left out of repair a sufficiently long time: *McNiroy v. Town of Bracebridge* (1905), 10 O.L.R. 360. If Madeira place is a private way, the defendant is not liable, because the invitation of the owner is only to those who have business with persons residing therein. The plaintiff was only a volunteer, who took all risks: *Lowery v. Walker*, [1910] 1 K.B. 173; *Sullivan v. Waters* (1864), 14 Ir. C.L.R. 460; *Wiggins v. Semi-Ready Clothing Co.* (1902), 23 C.L.T. Occ. N. 117; *Smith on Negligence*, ed. of 1887, pp. 25, 26. So, if there was dedication, the city corporation, if any one, and not Galley, would be liable; if no dedication, then Madeira place is a private way, the plaintiff was not rightfully there, and so the defendant is not liable.

*MacGregor*, in reply. If Madeira place is a private way, the defendant is liable, because the plaintiff went on that way to do business with one of the residents, but took a wrong course in leaving, by mistake. So the plaintiff was there by invitation of the defendant, and the defendant is liable under *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311.

May 6. *BRITTON*, J. (after stating the facts as above):—As the defendant did not know of the defective condition of the walk until after the accident, the only negligence which the jury could find, and what they probably intended to find, was that the defendant did not keep such a watchful eye over the walk as to prevent its remaining in a defective condition for any longer time than was reasonably necessary actually to do the work of repair.

If the defendant was the owner, there was an invitation by her to the public to use the place for any purpose of walking or driving upon and over it, and she would be liable if she placed

D. C.  
1910  
RUSHTON  
v.  
GALLEY.

D. C.  
1910  
RUSHTON  
v.  
GALLEY.  
—  
Britton, J.

upon it, or allowed to remain upon it, after knowledge of its being placed by others, anything in the nature of a trap, dangerous to the users of the place. This hole in the walk was not a trap—the plaintiff was not using the walk as an ordinary person on foot would use it; so, as I view the case as presented by the plaintiff and upon the evidence, he is not entitled to recover.

On the other branch of the case I agree with the learned trial Judge that Madeira place is a public street which ought to be kept in repair by the city. So far as appears, it is not a street established by by-law of the corporation of the city of Toronto, but it has been “otherwise assumed for public use by such corporation,” within the meaning of sec. 607 of the Municipal Act.

The plaintiff contends that, even if this is a public street, the defendant, having done the work of repair, assumed the duty, and is, therefore, liable for neglect of such duty. I do not agree that the voluntary doing and doing continuously up to a certain date something that another ought to do, creates a liability for neglect or refusal to continue; and, further, if there could be liability for neglect to repair, it could only arise after knowledge of want of repair. Here there was no knowledge. Merely not knowing the want of repair before the accident happened is not sufficient to warrant a finding of negligence. The defendant was not, as against the plaintiff, bound to see that the walk was in a constant state of reasonable repair. It would be quite different if the defendant constructed a dangerous walk or placed an obstruction or caused a pit to be dug near the walk or a hole to be made in it; in such a case there might be liability. In the present case, in my opinion, the defendant is not liable, and the appeal should be dismissed with costs.

RIDDELL, J.:—Edward Galley was the owner of certain property on the east side of Parliament street, Toronto. About forty years ago, he laid out a lane leading east from Parliament street between building lots of his own on either side; and there were also building lots at the end of the lane—a blind lane, which had at the north side of its east end a short L. This lane has ever since been open. There was no formal dedication to the city, but the city many years ago had a gas main and two gas lamps put upon the lane, and also a water main with a hydrant at the east end. The

city has not assessed the lane, even of late years; and it seems to have been considered and used in all respects, except one, as a city street. But Mr. Galley built the sidewalk apparently after what he claims as dedication; as he says: "I laid the sidewalk. I made the sidewalk. If I had to apply to the city, I would have had to pay for it, so I thought it was cheaper to do it myself than to let them build it." He repaired the sidewalk also from time to time as it was required.

In 1896 Galley gave the property to his wife, the present defendant, but he continued to look after it for her.

On Thursday afternoon, the 22nd October, 1908, a pedlar drove upon this sidewalk and broke it, but neither the defendant nor her husband knew anything of this till after the accident to the plaintiff, which happened on the following Saturday. Upon this day the plaintiff, also a pedlar, had bought some hay and straw from one Elliott, who had a store at the south-east corner of Parliament street and the lane; he went to the store, and then, thinking that the lane was open at the other end, instead of being a blind lane, as it actually was, he drove along the lane toward the east. Having some trouble with his horse, he jumped out upon the sidewalk, and, unfortunately, at the very point at which the sidewalk had been broken on the preceding Thursday. His leg went into the hole, and he suffered severe injury.

At the trial before my brother Latchford with a jury, the trial Judge left certain questions to the jury, and himself disposed of the remainder of the case, a course not now complained of by the plaintiff. The following are the questions and answers:—(set out above).

The plaintiff asked that the following question should also be left to the jury, but the learned trial Judge declined: "Could the defendant, by the exercise of reasonable diligence, have discovered this and repaired it before the happening of the accident?"

My brother Latchford, after consideration, held that the lane had been accepted by the city; and on that ground and others dismissed the action.

Upon appeal before us, the plaintiff, while submitting to the course taken at the trial, contended that the learned trial Judge was wrong in his conclusions.

Most of the argument was directed to the contention that the

D. C.  
1910  
RUSHTON  
v.  
GALLEY.  
Riddell, J.

D. C.  
1910  
RUSHTON  
v.  
GALLEY.  
Riddell, J.

lane was not a public lane belonging to the city, as found by Mr. Justice Latchford, but a private lane, as had been strenuously contended for at the trial. I am of opinion that, if the plaintiff should succeed in this contention, he would prove himself out of Court. The lane, if a private one, was at best for the use of those who had business with those living in the adjoining residences, and was not a through road, a thoroughfare, for those wishing to pass from Parliament street to any other street. The plaintiff had no right to be where he was, and was a trespasser: that he had mistaken his way did not change his character. The duty owed to trespassers—or the want of it—has been considered in many cases, the latest of which perhaps is *Lowery v. Walker*, [1910] 1 K.B. 173; and the law is quite settled. The trespasser must take things as he finds them.

But I am of opinion that the learned trial Judge was right in finding, as he did, that the owner of the land intended to dedicate this lane, and that the city had accepted the dedication, long before the defendant became owner of the property adjoining. I cannot see, however, that that finding disposes of the case; nor am I able to agree that the act of the plaintiff was itself sufficient to disentitle him to relief, as was argued by the defendant's counsel. If this was (as I find it was) a public highway, the plaintiff had a right to go along it in search of an outlet, and to see if it led to another public highway; and there was nothing in his act in leaping upon the sidewalk in itself wrong. The jury have, as they well might, negatived contributory negligence, and it seems to me that the rights of the parties will depend upon the duty of the defendant in respect of the sidewalk, bearing in mind that the highway was a public one. The liability of the city is not here in question, nor an element in the consideration—the city is not a party to the action.

Had the defendant's husband, upon dedicating the lane as he did to the city, ceased to do anything further in the way of repairs or otherwise to the sidewalk, if already existing, there could be no ground for holding the defendant liable. But he, and afterwards she through him, interfered with the sidewalk, built or at least repaired it—there is no pretence that the part of the sidewalk which was broken had not been put in since the transfer to the defendant of the title to the adjoining land, or that it had



not been put in by Galley as agent for his wife, the defendant. If we take then as proved what was practically admitted, that the defendant placed the sidewalk, *i.e.*, that part of it which was broken, upon the lane, the land of the city, what follows? If she could be called a trespasser, I think she is liable irrespective of negligence: *Dygert v. Schenck* (1840), 23 Wend. 446; see especially p. 447: "The utmost care to prevent mischief will not protect him. . . . Caution is a defence predicable of him only who is in legal pursuit of his own business, or engaged in the legal use of his own property." See also *Calder v. Smalley* (1885), 66 Iowa 219, at p. 221; *Congreve v. Morgan* (1858), 18 N.Y. 84; Dillon on Municipal Corporations, secs. 1031, 1032.

In the *Congreve* case an excavation had been made by the defendants in the street without authority and covered with a flagstone, which broke and caused injury to the plaintiff. The Court (p. 85) says: "The liability of the defendants does not depend upon their negligence, either in providing an unsuitable stone or in continuing the use of it, after it had become unsuitable from any cause, but from the fact that the stone was unsafe at the time the injury occurred, and thereby occasioned the injury. . . . They were bound, at their peril, to keep the area covered. . . ." So in the case of *Congreve v. Smith* (1858), 18 N.Y. 79, arising from the same accident, it is said (p. 82), "No question of negligence can arise, the act being wrongful."

The following cases may also be considered: *Hadley v. Taylor* (1865), L.R. 1 C.P. 53; *Pfau v. Reynolds* (1870), 53 Ill. 212; *City of Portland v. Richardson* (1866), 54 Me. 46; *Osborn v. Union Ferry Co. of Brooklyn* (1869), 53 Barb. 629; *Jennings v. Van Schaick* (1888), 108 N.Y. 530.

In the present case the defendant does not prove any express permission or license from the city to place or repair, but sufficient appears to shew that the city tacitly licensed and permitted what was done: *Robbins v. Chicago City* (1866), 4 Wall. (S.C.) 657.

And in such a case the private liability to repair is co-extensive with that of the city, and not more onerous, that is, there must be ordinary care and diligence—an absence of negligence.

In *Drew v. New River Co.* (1834), 6 C. & P. 754, the defendants had the right by statute to take up a pavement. Tindal, C.J., says, p. 756: "They were bound in doing the work to use such care

D. C.  
1910  
RUSHTON  
v.  
GALLEY.  
Riddell, J.

D. C.  
1910  
RUSHTON  
v.  
GALLEY.  
Riddell, J.

and caution as would prevent the King's subjects, themselves using reasonable care, from exposure to injury . . . ; and if (the plaintiff) stepped upon a stone which was, in fact, insecure, but had such an appearance of security as would induce a careful person . . . to think that it was safe, the defendants would be responsible, inasmuch as the so placing the stone would be an act of carelessness and negligence on the part of the workmen. His Lordship left it to the jury to say, whether the injury was occasioned by negligence and unskilfulness on the part of the workmen, or want of care in the plaintiff himself, or by accident, without fault on either side. In the two latter cases they would find . . . for the defendants."

Compare this with the *Congreve* cases above.

The same rule applies where the right to do the act is obtained by any other lawful means, as then the party is "in legal pursuit of his own business," to use the language of Cowen, J., in the *Dygart* case, *ut supra*. The same duty rests upon the party as upon the municipality: *Peoria v. Simpson* (1884), 110 Ill. 294, at p. 301.

In *Hopkins v. Town of Owen Sound*, 27 O.R. 43, the private defendant had constructed an approach with sleepers and planks without objection on the part of the town. The jury were asked, in an action for damages caused by the plaintiff's foot having gone into a hole in this approach, which had become dilapidated and out of repair: "Was the defendant negligent in not keeping the approach in good repair, assuming for the present that it was his duty to keep it in good repair?" It will be seen that, if the defendant should have been held liable as though he were a trespasser, this question would have been unnecessary. Upon the jury finding negligence, the learned Judge, Ferguson, J., directed judgment for the plaintiff. He adopted the dictum in *Weller v. McCormick* (1885), 47 N.J. Law 397, at p. 398: "When a person, for his private ends, places or maintains, in or near a highway, anything which, if neglected, will render the way unsafe for travel, he is bound to exercise due care to prevent its becoming dangerous." This, no doubt, is the rule to be followed in all cases in which the work is done by express or implied license or permission of the municipality—assuming, of course, as in the present instance, that the work was such as the municipality itself could lawfully do, and so could lawfully license.

Here the jury have negatived all negligence except the failure to repair from Thursday, the day of the breaking, to Saturday, the day of the accident. Consequently, we must assume that there was no defect in the original construction of the sidewalk. Nor is it contended that the defendant knew of the defect until after the occurrence of the accident. In view of the authorities, I do not think the jury can be allowed to infer constructive notice or to charge negligence in not repairing what was not known to be defective. The agent of the defendant went over the sidewalk on Thursday morning, and nothing defective was then apparent.

The Chancellor, in *McNiroy v. Town of Bracebridge*, 10 O.L.R. 360, refused to infer constructive notice where the defect had existed six days; and many other cases will be found in Denton on Municipal Negligence, pp. 243 *sqq.*, and Biggar's Municipal Manual, p. 835, n. (e). And, while constructive notice and negligence are logically quite distinct, I think a jury cannot be allowed to find negligence in not repairing within a time which would not justify a Court in inferring notice.

I am of opinion that the judgment is right, and the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree in the result.

---

D. C.  
1910  
RUSHTON  
v.  
GALLEY.  
Riddell, J.

[RIDDELL, J.]

## VANO V. CANADIAN COLOURED COTTON MILLS CO.

1910

May 9.

*Infant—Next Friend—Settlement of Action—Payment of Sum to Solicitors—Neglect to Obtain Approval of Court—Retention by Solicitor of Part for Costs—Payment to Next Friend—Ratification of Settlement by Plaintiff at Majority—Payment into Court—Con. Rule 840—Delivery and Taxation of Bill—Interest—Costs.*

An action having been brought on behalf of an infant as plaintiff, by a next friend, to recover damages for injuries sustained by the infant, a settlement was (after the action had been set down for trial) effected between the solicitors, under which the defendants paid to the plaintiff's solicitors \$800 "in full of claim and costs." Neither party obtained the consent and approval of the Court. No part of the money was paid into Court, as required by Con. Rule 840. The plaintiff's solicitors paid \$200 to the next friend "for his services," and retained \$300 for their costs. When the plaintiff became of age, he affirmed the settlement:—

*Held*, that the next friend is an officer of the Court and amenable to the order of the Court; and his conduct in receiving the \$200 and that of the solicitors (also officers of Court) in paying it, could not be justified; both the next friend and solicitors were liable for it; and they were ordered to pay it into Court, with interest.

Consideration of the position and powers of a next friend.

While a next friend is in the same position as a trustee in some respects, the statute giving compensation to trustees, R.S.O. 1897, ch. 129, sec. 40, does not cover his case, and he is not entitled to compensation or remuneration; though he stands in the same position as a trustee in respect of costs, charges, and expenses properly incurred before the action was brought.

*Held*, also, that the solicitors were not entitled to retain the \$300 for costs; and they were ordered to render a bill of costs and charges and pay \$200 and interest into Court; the bill rendered to be taxed, and the plaintiff to be at liberty to contend that no costs were payable; the taxing officer to certify by how much the amount of costs, etc., properly chargeable, was more or less than \$100; if the amount should be more than \$100, the excess without interest to be payable to the solicitors out of Court; if the amount should be less than \$100, the balance with interest to be paid into Court by the solicitors.

*Held*, also, that the solicitors might include in their bill any costs, charges, and expenses properly incurred by the next friend as above; and the next friend should have an opportunity to establish by action his claim to remuneration; the \$200 to remain in Court subject to further order.

The plaintiff having brought an action in a County Court to recover the \$500, but having elected to have his remedy by an order in the High Court in the original action:—

*Semble*, that the defendants in the County Court action might plead this election under Con. Rule 289, *puis darrein continuance*; and the plaintiff would then be entitled to his costs under Con. Rule 295, unless the Court should otherwise order.

The solicitors were ordered to pay the costs of all parties (except the defendants in the original action) of the motion upon which the order for payment into Court, delivery of bill, etc., was made, the whole trouble having arisen from their neglect to have the compromise approved by the Court and their own costs fixed or taxed, and by their disobedience to Con. Rule 840. The defendants were allowed no costs, as they should have seen that the settlement was approved by the Court.

MOTION by the plaintiff for an order for directions or for such other order as might seem just, in the circumstances set out below.



May 5. The motion was heard by RIDDELL, J., in the Weekly Court.

*M. Malone*, for the plaintiff.

*Featherston Aylesworth*, for the defendants.

*H. S. White*, for the next friend and former solicitors.

1910  
VANO  
v.  
CANADIAN  
COLOURED  
COTTON  
MILLS  
Co.

May 9. RIDDELL, J.:—The plaintiff, a young Greek, being then of 17 years of age and in the employ of the defendants at Hamilton, on the 12th October, 1906, suffered an accident whereby he lost part of his right hand.

An action was begun on the 27th November, 1906, Budimir Protich, a compatriot, acting as next friend, by Messrs. Bruce, Bruce, & Counsell as solicitors. The action was set down for trial, and on the 14th January, 1907, a settlement was arrived at (by the solicitors and counsel at least), whereby the defendants were to pay \$800 in full of claim and costs and were to give employment to the plaintiff as set out in the minutes of settlement signed by the solicitors. Neither party obtained the consent and approval of the Court; but the record was withdrawn. The defendants paid the \$800 through their own solicitors to the solicitors for the plaintiff; no part of this was paid into Court. The plaintiff says that the settlement was misrepresented to him, but I do not pass upon that matter, for reasons which will appear.

On the 13th September, 1909, the plaintiff brought an action in the County Court of the County of Wentworth, by another next friend, Kotarnum, against Messrs. Bruce, Bruce, & Counsell, claiming \$500 and interest. He alleges that he was to receive the whole \$1,000, and that the solicitors had retained \$300 for their own costs and paid Protich, the next friend, \$200. The defendants in that action admit the retention of \$300 as their costs and the payment of \$200 to Protich "for his services in boarding Vano and going security for the costs of his action against the company, and other services."

The action in the County Court came on for trial on the 14th December, 1909, before His Honour Judge Snider. At the close of the evidence that learned Judge reserved the whole case for argument and decision later, but indicated that he then thought that Protich would have to give back the \$200 and the solicitors render a bill to be taxed.

Riddell, J.

1910

VANO

v.

CANADIAN

COLOURED

COTTON

MILLS

Co.

Pending decision and on the 25th January, 1910, Messrs. Bruce, Bruce, & Counsell, affecting to act as solicitors for the plaintiff, served a notice of motion in the original action upon Mr. Malone as solicitor for Kotarnum, the next friend in the County Court action, upon the solicitors for the defendants in the original action, and upon the Official Guardian. The motion is "for an order for directions herein or for such other order as may seem just," and is supported by an affidavit of Protich. Upon the case coming before the Chief Justice of the Common Pleas, in February, 1910, that learned Judge suggested that the matter should stand over until the plaintiff came of age, and all proceedings in the County Court remain *in statu quo* in the meantime.

The plaintiff now is of age; he came of age on the 30th April, 1910; and at once proceeded to take out an order changing solicitors in this action from Messrs. Bruce, Bruce, & Counsell to Mr. Malone, who is his solicitor in the County Court action.

The matter came on before me on Monday of this week; and, at the request of Mr. White, I enlarged it till Thursday the 5th May, to enable him to determine his exact position.

Upon opening of the matter, I asked Mr. Malone if his client now ratifies and confirms the settlement made for him at the trial, and Mr. Malone expressly affirmed this settlement. The defendants, therefore, had no further interest in the matter except on the question of costs—they were out of the litigation.

Mr. Malone also expressly submitted all the rights of his client to be disposed of upon this application; all the other counsel did the same for their clients.

It will be necessary to consider the position of the next friend, as well as that of the solicitors.

At the common law an infant could only sue by his guardian: Hargr. Co. Litt. 135 *b* n. (1). The Statute of Westminster the First, *i.e.*, (1275) 3 Edw. I., by ch. 48, in cases in which a guardian or chief lord had made an infeoffment of the ward's land to the disinheritor of the heir, gave the heir his assise of novel disseisin against the guardian and the tenant, and if, for certain reasons, the infant could not sue his assise, then one of his next friends (*un de ses prochains amys*) might. The Statute of Westminster the Second, *i.e.*, (1285) 13 Edw. I., by ch. 15 extended this right to the case of all infants who might be "eloined" (*elongati*). It

was by analogy to the provisions of these statutes that "in all cases where a party cannot sue for himself, the Court employs a *prochein amy* as its officer to conduct the suit for him, and no appointment or subsequent confirmation by the party is requisite. It is, in fact, almost the same thing as appointing an attorney; the law, if we may so speak, appoints an attorney to act on behalf of the infant:" *per* Alderson, B., in *Morgan v. Thorne* (1841), 7 M. & W. 400, at p. 409. The designation "*prochein amy*" was long used in the common law Courts. The practice was for the intended "*prochein amy*" to appear with the infant before a Judge in Chambers; or a petition was lodged to the Judge on behalf of the infant asking for the appointment of the person named as his "*prochein amy*." The intended "*prochein amy*" had to give a written consent, verified by affidavit. Thereupon the Judge granted his *fiat*, upon which a rule or order was drawn up in the King's Bench by the Clerk of the Rules, or in the Common Pleas the Judge made his order for admission: Tidd's Practice, vol. 1, pp. 95 *sqq.*; Tidd's Supp. 2, p. 5. In the Exchequer the King's Bench practice was followed: 2 Archbold's Practice, 7th ed., p. 889.

In the Court of Chancery, it does not seem to have been the practice to take out an order appointing a next friend. "Any person may institute a suit on behalf of an infant:" Daniell's Ch. Practice, 3rd ed., p. 75; Story's Eq. Pl., sec. 57. While the infant could still as at the common law sue in the common law Courts by his guardian, that practice does not seem to have ever obtained in equity—though this is doubtful: see Story's note 3 to sec. 58. By the statute of 1852, 15 & 16 Vict. ch. 86 (Imp.), it was provided that before the name of any person could be used in Chancery as next friend, he must sign a written authority to the solicitor for that purpose (sec. 11)—this provision now appears in our Con. Rule 198\*—the consent of the infant was never necessary: *Wortham v. Pemberton* (1845), 9 Jur. 291. The terminology of the common law Courts whereby this officer was called a *prochein amy* was gradually assimilated until the Chancery name, "next friend," became universal.

\* Con. Rule 198. Unless otherwise ordered, before the name of any person is used, in a cause or matter, as next friend of an infant or other party, or as relator, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the office in which the cause or matter is commenced.

Riddell, J.

1910

VANO  
v.CANADIAN  
COLOURED  
COTTON  
MILLS  
Co.

Riddell, J.

1910

VANO

v.

CANADIAN  
COLOURED  
COTTON  
MILLS  
Co.

But both in law and in equity the *prochein amy* or next friend was an officer of the Court: *Morgan v. Thorne*, 7 M. & W. 400, 406.

The practice of the common law Courts of appointing a next friend continued until the fusion of law and equity by the Judicature Act, a comparatively late instance being *Campbell v. Mathewson* (1869), 5 P.R. 91.

The Ontario Judicature Act, 1881, by Rule 96, O. XII., r. 8, provided: "Infants may sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of the Act." As we had in Ontario no statute in the same terms as the Imperial Act 15 & 16 Vict. ch. 86, sec. 11, it became the practice to issue writs in the name of the infant by his next friend without written authorization by the next friend, until the new Rule 198 was passed (1897.) There is a similar provision also in the English practice at the present time.

None of the changes made in the practice either in England or in Ontario has at all affected the position of the next friend as an officer of the Court.

In view of what was done in this case, it may not be without value to examine into the powers of the next friend, and of the solicitors who are retained by him, for, of course, their authority is no higher than his (speaking generally). The next friend has full power over the ordinary proceedings and conduct of the action, such as giving consent to the evidence being taken by affidavit: *Knatchbull v. Fowle* (1876), 1 Ch. D. 604; *Fryer v. Wiseman* (1876), 24 W.R. 205, 45 L.J.Ch. 199; and see *Piggott v. Toogood*, [1904] W.N. 130. As to compromises, while a compromise will not be forced upon the next friend against his will: *In re Birchall* (1880), 16 Ch. D. 41: (the proper course being, in case it is considered the next friend is acting unreasonably, to remove him and substitute another, p. 42), compromises to which he assents are not in all cases binding. It is, perhaps, going too far to say (Holmsted & Langton, p. 349 *ad fin.*), "A compromise of an action brought by a next friend of an infant is invalid unless approved of by the Court," but the case cited of *Mattei v. Vautro* (1898), 78 L.T.R. 682, shews that if the Court cannot say that the compromise is for the infant's benefit it will not be considered binding and a bar to the further prosecution of the action. So, too, in *Rhodes v. Swithenbank* (1889), 22 Q.B.D. 577, it is said



that, though the compromise were entered into in all fairness, it would not necessarily be binding. All this shews the propriety, if not absolute necessity, of all such compromises or settlements being approved by the Court—as much for the protection of the defendants as for the sake of the next friend himself. Had the plaintiff not, upon attaining his majority and having his own solicitor, deliberately ratified the settlement made for him at the trial, there might have been great trouble for all concerned—fortunately that difficulty is avoided.

The next friend is an officer of the Court and is amenable to the order of the Court: his conduct in receiving the sum of \$200 from the proceeds of the compromise is complained of, and, in my judgment, rightly so. The conduct of the solicitors in paying him this sum is also complained of; and, in view of the provisions of Con. Rule 840\* and of the facts, there can be no pretence that this can be justified. The reason given by the solicitors for paying the next friend is, that they were told by the next friend that the plaintiff had been kept by him since the accident, and thereafter the next friend had looked after him and acted as interpreter; that the plaintiff and the next friend agreed that \$200 should be paid to the next friend “for his services in connection with the interpreting, keeping him, and everything.” Con. Rule 840 is clear that such a payment should not have been made, and that “no payment to the . . . next friend . . . of moneys due to such infant . . . otherwise than for the costs of the action, shall be a valid discharge as against the infant. . . .” The solicitors then are liable for this sum of \$200, as well as the next friend.

As to the remuneration of the next friend, there are many jurisdictions in which such a remuneration or compensation is allowed, but this right depends upon the statutes. In England it has never been considered that he was entitled to compensation for his services—upon the same principle that a trustee was not entitled to compensation. And, while a next friend is *sub modo* a trustee, and in much the same position as a trustee in some

Riddell, J.

1910

VANO

v.

CANADIAN

COLOURED

COTTON

MILLS

Co.

\* 840. Where money (other than for costs) is received by or on behalf of an infant . . . next friend . . . the same shall, unless otherwise ordered, be paid into Court, subject to further order; and no payment to the . . . next friend . . . of moneys due to such infant . . . otherwise than for the costs of the action, shall be a valid discharge as against the infant . . .

Riddell, J.

1910

VANO

v.

CANADIAN  
COLOURED  
COTTON  
MILLS  
Co.

respects, our statute giving compensation to trustees, 37 Vict. ch. 9, R.S.O. 1897, ch. 129, sec. 40, does not cover his case.

While considering the great responsibilities of persons in that capacity as to costs, etc., it might be reasonable that they should be paid compensation in the same way as, say, "guardians appointed by the Court;" that is for the Legislature, not for me—and it may well be that the Legislature would consider that the risk of litigation being brought for the purpose and with the object of obtaining such compensation more than counterbalances the advantage which would follow from permitting such allowances.

The next friend, however, stands in the same condition as a trustee in respect of costs, charges, and expenses properly incurred before the action was brought: *Palmer v. Jones* (1874), 22 W.R. 909; not simply solicitor and client costs in the action itself: *Fearn v. Young* (1804), 10 Ves. 184. He is entitled "not only to his costs but also to his charges and expenses under the head of just allowances," where he "has expended money by reasonably and properly taking opinions and procuring directions that are necessary in the due execution of his trust . . . for, as the infant himself cannot incur charges and expenses if they cannot be claimed under just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept that office." So says Lord Eldon; and I do not find his dictum questioned. I do not know whether any claim of this kind is made by the next friend—if so, the amounts claimed may be added to the solicitors' bill of which I am about to speak.

Under the circumstances, the solicitors having received the whole amount, it is too clear for argument that a bill of costs must be rendered, and, if the plaintiff desires it, taxed. This I understand the solicitors do not object to—it must be done with all convenient speed.

It has been said that if the infant on attaining full age elect to continue the suit, he becomes liable for the costs from the beginning as though the suit had been begun by him as an adult: *Bligh v. Tredgett* (1852), 21 L.J.Ch. 204. This, however, does not mean that he is liable to the solicitor for costs in any event and even if he would not have been liable had he been an adult. Where, as in the present case, the plaintiff adopts

and ratifies a settlement, he is liable for such costs, if any, as he would have been liable for had he been an adult when he began the action. It will, therefore, be open to him to prove, if he can, that the services of the solicitors were to be *gratis* or on any special terms. Nor is he estopped by the terms of the settlement, "Defendants to pay \$800 in full of claim and costs:" all this means is, that, as between the plaintiff and defendants, the sum of \$800 is all that is to be paid by the defendants. The plaintiff is not thereby to be held to say that any particular costs or any costs were to be paid thereout or at all to his solicitors.

Upon a bill of costs interest is not chargeable until the bill is taxed as a general rule: *West v. West* (1886), 17 L.R. Ir. 49; but it would be wholly unjust, if the solicitors are found to be entitled to any costs, to order them to pay interest upon the whole sum of \$300 and disallow them interest upon the amount to which they were actually entitled. The same considerations do not apply to the \$200 paid the next friend—that must be paid with interest from the day it was received from the defendants.

The plaintiff having expressly elected to have his remedy by an order in this Court rather than in the County Court, there is no reason why the defendants in the County Court action should not plead this election under Con. Rule 289, *puis darrein continuance*: the plaintiff then would be entitled to his costs under Con. Rule 295, unless the Court should otherwise order. I have no power—had I the inclination, which I have not—to interfere with the discretion of the learned County Court Judge: he is master in his own house. It may be that considerations which do not occur to me will convince the Judge that he should make an order otherwise than that the defendants shall pay the costs: I cannot and do not dictate his course.

The solicitors cannot be compelled to plead as I have indicated, and they may prefer to run the risk of having a judgment against them in the County Court as well as the order I am about to pronounce.

The next friend and the solicitors must pay into Court forthwith \$200 and interest since the 14th January, 1907; the solicitors must pay into Court, in addition, forthwith, the further sum of \$200 and interest, and deliver a bill of their costs and charges to the plaintiff, including therein any amount claimed for the next

Riddell, J.

1910

VANO  
v.CANADIAN  
COLOURED  
COTTON  
MILLS  
Co.

Riddell, J.  
1910  
VANO  
v.  
CANADIAN  
COLOURED  
COTTON  
MILLS  
Co.

friend under the principles I have laid down. This bill will be taxed by the Local Registrar at Hamilton; the plaintiff to be at liberty to contend that no costs are payable whether such contention is made under an agreement before, during, or since the litigation or on any other ground whatsoever. The taxing officer will certify by how much the amount of costs, etc., properly chargeable, is more or less than \$100; if the amount is in excess of \$100, the excess without interest will be payable to the solicitors out of Court from the sum paid in; if the amount is less than \$100, the balance with interest will be paid into Court by the solicitors.

The taxing officer will deal with the costs of taxation under sec. 40 of the Solicitors Act; and the costs of taxation are to be added to or subtracted from the amount to be paid into or out of Court by or to the solicitors, according to the party chargeable therewith, but no interest is to be computed upon these costs.

The next friend claiming that he is entitled as against the plaintiff to be paid for services which cannot be considered in the taxing office, the money paid into Court will remain there (except such as may be paid out to the solicitors) for the period of six weeks from this day to allow the next friend to take an action against the plaintiff to establish his claim; and, if such action be taken, the money will remain in Court until the conclusion of that action. Any party may apply at any time for further or other order.

As to costs, the defendants in this action, the Canadian Coloured Cotton Co., should have seen to it that the settlement was approved by the Court. Had that been done, it is more than likely that these proceedings would not have needed to be taken. At all events, they cannot complain if they are not given costs—there will be no costs so far as they are concerned.

But as to the other parties served with notice of motion, including the Official Guardian, the solicitors must pay their costs—including the costs of the several enlargements; the whole trouble has arisen from the neglect of these solicitors to follow the well established, and, so far as I know, constantly followed, practice of having the compromise approved by the Court and their own costs either fixed by the Court or properly taxed—



added to the fact that they disobeyed an express rule laid down for their guidance.

It is, I trust, not necessary for me to say that there is no imputation of any want of good faith and honest intention on the part of the solicitors—but they at their peril left the well-trodden path known to them and all solicitors to be safe; and, having gone astray, they must pay the penalty. Good intentions are notoriously and proverbially not necessarily effective in producing good results.

---

[DIVISIONAL COURT.]

RE GOOD AND JACOB Y. SHANTZ SON & CO. LIMITED.

*Company—Transfer of Paid-up Shares—Refusal of Directors to Allow—Dominion Companies Act—By-law—Ultra Vires—Leave to Appeal.*

A company incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79, purporting to act under the authority of sec. 80, passed a by-law providing that shareholders might, with the consent of the board of directors, but not otherwise, transfer their shares, and that no person should be allowed to hold or own stock in the company without the consent of the board, and that all transfers of stock must be approved by the majority of the directors before being entered:—

*Held*, that it was beyond the powers of the company, as defined by the Act, to prohibit the transfer of paid-up shares.

Reference to secs. 45, 64-68, and 80.

*In re Macdonald and Mail Printing and Publishing Co.* (1876), 6 P.R. 309, *In re Gresham Life Assurance Society* (1874), L.R. 8 Ch. 446, and *In re Coalport China Co.*, [1895] 2 Ch. 404, distinguished.

Order of TEETZEL, J., requiring the company to allow a transfer of paid-up shares to which the directors had refused to consent, affirmed by a Divisional Court.

Leave granted to the company to appeal to the Court of Appeal.

MOTION by J. S. Good for an order in the nature of a *mandamus* requiring the company to allow a transfer to the applicant of five fully paid-up shares of the capital stock of the company.

February 15. The motion was heard by TEETZEL, J., in Chambers.

*H. S. White* and *W. M. Cram*, for the applicant.

*E. E. A. DuVernet*, K.C., and *E. W. Clement*, for the company.

March 14. TEETZEL, J.:—Upon the material it is quite clear that the shares in question are fully paid-up, and that the applicant, J. S. Good, duly requested the transfer to be made upon

Riddell, J.

1910

VANO

v.

CANADIAN  
COLOURED  
COTTON  
MILLS  
Co.

D. C.

1910

March 14.

May 9.

May 19.

D. C.  
1910  
RE  
GOOD  
AND  
SHANTZ Co.  
Teetzel, J.

the company's books of the shares in question, which stood in the name of Isaac Good, and that the directors of the company refused to allow it to be done, after having been given reasonable time to comply with the request.

I would also find, upon the material, that the directors acted in good faith in refusing to allow the transfer to be made, and that they were honest in the position taken that it was not in the interests of the company to permit the applicant to become a shareholder.

The only question, therefore, is whether, under the statute and the by-laws of the company, the directors can be compelled to allow the transfer to be made upon the books of the company.

The company was incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79; sec. 45 of which provides that the stock of a company incorporated thereunder shall be personal estate, and shall be transferable, in such manner and subject to all such conditions and restrictions as are prescribed by Part I. of the Act or by the letters patent or by the by-laws of the company.

Section 80 authorises the directors to make by-laws regulating the transfer of the stock.

By-law number 17 of the company provides "that shareholders may, with the consent of the board, but not otherwise, transfer their shares, and such transfers shall be recorded in a book provided for that purpose and signed by him or her and the transferee, duly witnessed. But no person shall be allowed to hold or own stock in the company without the consent of the board, and all transfers of stock must first be approved by the majority of directors before such transfer is entered."

It was held in *In re Imperial Starch Co.* (1905), 10 O.L.R. 22, in the case of a company incorporated under the Ontario Companies Act, which contains a provision similar to that found in the Dominion Act, that the Act nowhere authorises a company to refuse to transfer on their books fully paid-up shares, notwithstanding that in that case the company had passed a by-law providing that no transfer should be valid unless approved of by the directors, and that all transfers of stock should be at the discretion of the directors.

I cannot distinguish that case from this, and I am bound to

follow it, notwithstanding that it may be difficult to reconcile it with such cases as *In re Macdonald and Mail Printing and Publishing Co.* (1876), 6 P.R. 309; *In re Gresham Life Assurance Society* (1872), L.R. 8 Ch. 446; and *In re Coalport China Co.*, [1895] 2 Ch. 404.

I must, therefore, allow the application with costs.

The company appealed from the order of TEETZEL, J.

March 22. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

A. H. F. Lefroy, K.C., for the appellants. The company should not be compelled to transfer the shares in question. Under the statutes relating to Dominion companies and to this company, the directors of the company had power to make and did make a by-law of the company, which was afterwards duly sanctioned by the shareholders, whereby shareholders could transfer their shares only with the consent of the board of directors, and whereby all persons were prohibited from holding or owning stock in the company without the consent of the board of directors, and whereby all transfers of stock have first to be approved by the majority of directors before such transfer can be entered in the stock-book. The applicant took his transfer of the shares in question from his transferor with full knowledge and notice of this by-law, and is bound by it, and cannot claim to have his transfer entered; nor has he the right to hold stock in the company without the consent of the board of directors, which consent has been refused. The board of directors, in refusing to accept or record the transfer, and to accept the applicant as a shareholder, acted *bonâ fide*, and not oppressively, capriciously, or corruptly, and are in no way bound to disclose their reasons for so doing. Reference to the Dominion Companies Act, R.S.C. 1906, ch. 79, secs. 45 and 80; *In re Pantton and Cramp Steel Co.* (1905), 9 O.L.R. 3; *In re Macdonald and Mail Printing and Publishing Co.*, 6 P.R. 309; *In re Gresham Life Assurance Society*, L.R. 8 Ch. 446; *In re Coalport China Co.*, [1895] 2 Ch. 404; *Upton v. Hutchison* (1899), Q.R. 8 Q.B. 505, 508; *Barnard v. Duplessis Independent Shoe Machinery Co.* (1907), Q.R. 31 S.C. 362.

W. E. Middleton, K.C., and H. S. White, for J. S. Good. The order for the transfer of the shares should stand. Paid-up stock

D. C.  
1910  
RE  
GOOD  
AND  
SHANTZ Co.  
Teetzel, J.

D. C.  
1910  
—  
RE  
Good  
AND  
SHANTZ Co.

is personal property, subject to transfer as any other personal property. The company can only deal with the transfer of share, in the way of "regulating" it. Before shares are fully paid-up, the directors can refuse their consent to a transfer, because a shares holder cannot substitute for himself a debtor who is worthless. But, once the stock is fully paid-up, it becomes personal property, and can be alienated without the company being able to prevent the transfer. Stock might become unmarketable if this were not so. A sufficient reason must be assigned in all cases for a refusal to transfer. Reference to the Dominion Companies Act, R.S.C. 1906, ch. 79, secs. 45, 64, 65, 66, 67, and 80; Lindley's Law of Companies, 6th ed., vol. 1, p. 646; *In re Smith v. Canada Car Co.* (1873), 6 P.R. 107; *Third National Bank of Buffalo v. Buffalo German Insurance Co.* (1904), 193 U.S. 581; *Earle v. Carson* (1903), 188 U.S. 42; *Herring v. Ruskin Co-operative Association* (1899), 52 S.W. Repr. 331; Cook on Corporations, 6th ed., vol. 1, p. 331.

*Lefroy*, in reply. The English authorities and Lindley in his work on Companies state that the directors can exercise their discretion without giving reasons.

May 9. The judgment of the Court was delivered by MACLAREN, J.A.:—This is an appeal from the judgment of Teetzel, J., ordering the company to transfer in its books five fully paid-up shares of its stock assigned by Isaac Good to the applicant, J. S. Good.

The company justified its refusal, relying on its by-law providing "that shareholders may, with the consent of the board, but not otherwise, transfer their shares. . . . But no person shall be allowed to hold or own stock in the company without the consent of the board, and all transfers of stock must first be approved by the majority of directors before such transfer is entered."

The learned Judge found that the directors acted in good faith, but held that he was bound to follow the decision in *In re Imperial Starch Co.*, 10 O.L.R. 22, although it might be difficult to reconcile that decision with such cases as *In re Macdonald and Mail Printing and Publishing Co.*, 6 P.R. 309; *In re Gresham Life Assurance Society*, L.R. 8 Ch. 446; and *In re Coalport China Co.*, [1895] 2 Ch. 404.

While there were some allusions in the material to the reasons



for refusing the transfer, the counsel on both sides stated that they desired the case to be decided on the broad question of the validity of the by-law and the right of the directors to refuse without assigning any reasons.

The company was incorporated in 1895, by letters patent under the Dominion Companies Act, and the by-law in question was adopted at the organisation of the company on the 13th March, 1895. The five shares in question form a part of one hundred and twenty-four shares for which Isaac Good holds a certificate dated the 15th July, 1901. It does not appear whether or not he was a shareholder before that date, but this may be immaterial.

Section 45 of the Dominion Companies Act, R.S.C. 1906, ch. 79, provides that "the stock of the company shall be personal estate, and shall be transferable, in such manner and subject to all such conditions and restrictions as are prescribed by this Part (of the Act) or by the letters patent or by the by-laws of the company." The sections of the Act relating to transfers are from 64 to 68 inclusive, and provide that no transfer of shares not fully paid-up shall be made without the consent of the directors; that no share shall be transferable until all previous calls are fully paid; and that the directors may decline to register any transfer of shares belonging to a shareholder who is indebted to the company. The letters patent do not appear to have anything on this point.

The refusal of the directors is based upon the by-law above quoted, which purports to have been passed under the authority of sec. 80 of the Act, which provides that the directors may make by-laws not contrary to law, or to the letters patent of the company, as to matters therein named, one of them being "the regulating of . . . the transfer of stock."

By-laws passed under the provisions of a statute cannot go beyond the express or implied power conferred upon the body authorised to pass them, and, in addition, they must be reasonable.

The object of a by-law authorised by sec. 80 is "the regulating of . . . the transfer of stock." Section 65 of the Act had already given the directors power to prevent the transfer of shares only partly paid-up, and the by-law now in question purports to confer upon the directors the same power as to fully paid-up shares

D. C.  
1910  
RE  
GOOD  
AND  
SHANTZ Co.  
Maclaren, J.A.

D. C.  
1910  
RE  
GOOD  
AND  
SHANTZ CO.  
Maclaren, J.A.

as the statute had done with reference to shares only partly paid-up, when the same reason does not exist. Instead of being a by-law to regulate, it might be more properly intituled a by-law to prevent or prohibit, the transfer of stock. For a discussion of this point, even when the word "govern" was added to "regulate," see the remarks of Lord Davey in the judgment of the Privy Council in *City of Toronto v. Virgo*, [1896] A.C. 88, at p. 93, where he closes by saying: "An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words."

On examination, the cases mentioned by the trial Judge as being against the claim of the present plaintiff, and which were strongly pressed upon us by counsel for the appellants, may, I think, be distinguished from the present case.

In the *Gresham* case the restriction was contained in the deed of settlement, which had been executed by the party desiring to transfer, so that it was a matter of contract, which would not be subject to the same conditions and tests as a by-law under our Act. In addition Mellish, L.J., says at p. 451: "This being an insurance company, it is quite obvious that it may be a matter of very great importance to the company that they should have a substantial body of shareholders. The very existence and credit of the company may depend upon that, and in order to procure that by the deed of settlement, the directors are invested with an absolute power to reject any transferee."

In *In re Coalport China Co.* the restriction in question was in the articles of association, which had been signed by the transferor; and sec. 16 of the Act of 1862, under which the company was incorporated, provides that the articles "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles." The grounds on which the directors might refuse a transfer were set forth in the articles, and the Court held that the applicant had not proved that the case did not come within these. This, again, was in reality a case of contract, and the test of reasonableness, which is the proper one under our Act, does not apply.

*In re Macdonald and Mail Printing and Publishing Co.*, being under our own statute, is more nearly applicable; but in this the manager of the company stated in his affidavit that the company was formed for political purposes, and that the directors considered it inimical to these purposes to allow the transfer. Hagarty, C.J., said in his judgment that the reasons suggested in the affidavits seemed amply to justify the refusal to allow the transfer. And see, *contra*, the judgment of Richards, C.J., in *In re Smith v. Canada Car Co.*, 6 P.R. 107, under the Companies Act of 1864, which in this respect was similar to the present Act.

In the United States the course of the jurisprudence has been varied, but on the whole not very dissimilar to our own. The general result of the authorities appears to be fairly summed up as follows: "Shares of stock in a corporation being personal property, and the *jus disponendi* being incident to the very nature of property, it follows that a by-law which undertakes to prohibit a shareholder from freely transferring his shares is ordinarily void, as being in restraint of trade and against common right:" 10 Cyc., p. 359.

On the whole, I am of opinion that the by-law in question in this case goes beyond the spirit and intent of the Act, and is invalid and not binding upon the transferor and transferee.

The appeal should be dismissed with costs.

The company moved for leave to appeal to the Court of Appeal from the order of the Divisional Court.

May 13. The motion was heard by Moss, C.J.O., in Chambers. Lefroy, K.C., for the company.  
White, for J. S. Good.

May 19. Moss, C.J.O.:—The Jacob Y. Shantz Son & Co. Limited applies for leave to appeal from an order of a Divisional Court affirming an order made by Teetzel, J., requiring the company to transfer in its books five fully paid-up shares of its stock assigned by one Isaac Good, a shareholder in the company, to the applicant, J. S. Good.

The amount in controversy in the appeal is much below the statutory sum of \$1,000, but the question involved is, doubtless, of general importance as respects joint stock companies. In this

D. C.  
1910

RE  
GOOD  
AND  
SHANTZ Co.  
Maclaren, J.A.

D. C.  
1910  
RE  
GOOD  
AND  
SHANTZ Co.  
Moss, C.J.O.

proceeding it has been definitely determined that it is beyond the power of a company, incorporated under the provisions of the Dominion Joint Stock Companies Act, to enact a by-law, through its directors or otherwise, which prevents shareholders from transferring any of their fully paid-up shares except with the consent of the directors. This appears to be the first express decision to that effect, though the point has been several times before the Courts. It was not dealt with in *In re Smith v. Canada Car Co.*, 6 P.R. 107; Richards, C.J., saying (p. 100): "The question was not discussed before me, how far the directors had power to make such by-laws as being inconsistent with the provisions of the charter as to the assignable character of the stock." Neither was it in *In re Macdonald and Mail Printing and Publishing Co.*, 6 P.R. 309, where the power to pass the by-law seems to have been taken for granted.

In the present case Teetzel, J., considered himself bound by the decision in *In re Imperial Starch Co.*, 10 O.L.R. 22. But that case in turn appears to have been dealt with as governed largely, if not altogether, by the decision in *In re Panton and Cramp Steel Co.*, 9 O.L.R. 3, a case in which there was no by-law, and the decision seems to have turned upon the absence of one. The passage from the judgment of Osler, J.A., to which MacMahon, J., refers in the *Imperial Starch Co.* case (p. 25) is not correctly given there. In the report in 9 O.L.R. it reads (p. 4): "The transfer being in order and the stock paid in full, the directors *in the absence of a by-law under sec. 47 (a) regulating the transfer* had no discretion to exercise in the matter or option but to comply with the demand of the transferee to record it." So that the decision of the Divisional Court in this case may be said to be the first determination of the precise question. That, of course, is not in itself a sufficient ground for a further appeal. But it is urged that, as the question is one of much consequence to companies, many of which seem to have a by-law similar to that in question here, the case is one that may well bear further discussion. That may be so. But the position and rights of the proposed respondent must also be considered. He has the judgment of the Judge of first instance in his favour, and, according to the general rule, is entitled to claim that there shall be no further appeal, especially as the amount at stake, which is all that he is



concerned in, is small. If the company desires to obtain a further opinion, the respondent should not be required to incur the expense incidental to that proceeding.

The order I make is, that, upon the company undertaking to pay the respondent's costs of the appeal, as between solicitor and client, in any event of the appeal, it be at liberty to appeal upon the sole question of the power to restrict the transfer of fully paid-up shares in the manner provided by the by-law in question

The costs of the application will be costs to the respondent in any event.

If this be not accepted, the application is dismissed with costs.

[The terms were accepted, and the appeal set down.]

D. C.

1910

RE  
GOOD  
AND

SHANTZ Co.

Moss, C.J.O.

---

[IN CHAMBERS.]

DURYEA V. KAUFMAN.

1910

April 29.  
May 10.

*Pleading—General Rules—Action in Respect of Patents for Invention—Contract—Breach—Infringement—Statement of Defence and Counterclaim—License—Invalidity—Inconsistency—Alternative Relief—Costs—Con. Rule 273—Fraud—Estoppel.*

There is no difference between the rules governing pleadings in the High Court in actions in respect of patents for inventions and those governing pleadings in any other ordinary action. The pleadings must disclose what is to be tried; every pleader is at liberty to allege any fact which would be allowed to be proved, but only such facts; and the facts are to be set out in an understandable form and not left to be inferred by mere conjecture. No pleading can be said to be embarrassing if it alleges only facts which may be proved; but a pleading which sets out a fact which would not be allowed to be proved is embarrassing. Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded; but the Court will not allow any fact which is wholly immaterial, and can have no effect upon the result, to be alleged.

By the statement of claim the plaintiff alleged that he was the owner of certain Canadian patents for improvements in methods of manufacturing starches and other articles of commerce; that, by an agreement between the plaintiff and defendants, the defendants were allowed to use the plaintiff's inventions upon certain conditions and arrangements set forth; that the plaintiff had performed all that he was bound to do under the agreement; but that the defendants, having taken full advantage of the inventions, refused to carry out the obligations consequent thereon; he also alleged infringement of his patents; and claimed an injunction and damages for breach of contract, or an account of profits and an injunction against infringing, and a declaration that the defendants were not entitled to use the inventions under the agreement. The defendants, by their statement of defence and counterclaim, admitted the agreement, said that they had the right to manufacture under it, denied the validity of the patents, and asked for relief. The plaintiff moved to strike out so much of the statement of defence and

1910

DURYEA  
v.  
KAUFMAN.

counterclaim as denied the validity of the patents or that the inventions or improvements were either new or useful; and also the part of the counterclaim by which the defendants asked for a declaration that they were entitled to use the plaintiff's patents under the agreement in question, or, in the alternative, that the patents should be declared invalid. By the counterclaim also a declaration was sought that the plaintiff was required to carry out the agreement, and damages for his alleged failure to do so were claimed:—

*Held*, that the defendants were at liberty to attack the validity of the patents; if at the trial an existing and valid license to the company should be proved, the defence of invalidity of the patents would be of no avail; but there was no reason why at present the defendants should not set up inconsistent defences. They might also counterclaim for a declaration of the invalidity of the patents. If they had added other claims which were inconsistent and embarrassing, the Court might deal with that in disposing of the costs; a paragraph of a prayer for relief will rarely be stricken out; and, under Con. Rule 273, relief may be claimed in the alternative.  
Order of the Master in Chambers, refusing the plaintiff's motion, affirmed.  
Discussion of the defences of license and invalidity in patent cases, with special reference to fraud and estoppel, and review of the authorities.

MOTION by the plaintiff for an order that parts of the statement of defence and counterclaim of the defendants the Edwardsburg Starch Company be struck out or amended.

April 26. The motion was heard by the Master in Chambers.  
*Casey Wood*, for the plaintiff.

*D. L. McCarthy*, K.C., for the defendant company.

April 29. THE MASTER:—The action is in respect of an agreement between these parties made in January, 1908, which is set out at length in the statement of claim and admitted by the defendants.

This recites that the plaintiff had made valuable discoveries in respect of the business carried on by the starch company, for which he had secured patents both in Canada and the United States. These it was agreed that the defendants were to be allowed to use, on certain conditions and arrangements fully set out in the agreement, which covers twelve type-written pages.

The plaintiff alleges that he has performed all that he was bound to do under the said agreement, but that the defendants have taken full advantage of his discoveries, and yet refuse to carry out the obligations consequent thereupon.

He asks an injunction and damages for such breach of contract, or an account of profits and an injunction against infringing his patents in the said agreement referred to, and a declaration that the defendants are not entitled to use the same under the said agreement.

It would appear from the pleadings that the action is not substantially for infringement, but for breach of the agreement between the parties.

On this ground an order is asked for striking out so much of the statement of defence and counterclaim as "denies the validity of the plaintiff's patents or that the inventions or improvements covered thereby are either new or useful," etc., and also clause (b) of paragraph 4 of the counterclaim, which asks for a declaration that the defendant company are entitled to use the plaintiff's patents under the agreement in question, or, in the alternative, that the said patents be declared invalid. The counterclaim also asks for a declaration that the plaintiff should carry out the agreement and for an order requiring the plaintiff to go on and carry out the agreement in question in every particular. The defendant company also ask damages for the plaintiff's failure to do so.

It was contended in support of the motion that, inasmuch as the defendant company were asking by their counterclaim to have the agreement carried out, it was not open to them to attack the validity of the patents with which that agreement dealt; this was asking inconsistent relief, which is always held to be embarrassing; and that, if this were not prevented, great loss and delay might be incurred by requiring a defendant to come prepared to meet two entirely different claims.

Cases were cited on the argument; and I have considered them and others which seem to be in point.

The chief of these are as follows:—

In *Liardet v. Hammond Electric Light and Power Co.* (1883), 31 W.R. 710, it was held that in an action to enforce a contract for the sale of a patent without warranty its validity could not be attacked; and that such a defence should be struck out as embarrassing—"otherwise, the plaintiff might have to come to the trial with a body of evidence to prove the validity which would be entirely thrown away:" *per* Bowen, L.J., at p. 711.

In *Evans v. Davis* (1878), 10 Ch.D. 747, 27 W.R. 285, it was held that a claim for inconsistent relief was embarrassing to the defendants, and on that account costs were refused to a successful plaintiff.

In *Gent v. Harrison* (1893), 69 L.T.N.S. 307, the same rule was

Master in  
Chambers.

1910

DURYEA  
v.  
KAUFMAN.

Master in  
Chambers.

1910

DURYEA  
v.  
KAUFMAN.

laid down, and it was said that the defendant ought in such a case to have called on the plaintiff to elect for which relief he would proceed.

In the recent case of *Moore v. Ullocoats Mining Co.*, [1908] 1 Ch. 575, at p. 587, *Evans v. Davis*, *supra*, was followed. Other cases on the same point were cited in that judgment.

In *Beam v. Merner* (1887), 14 O.R. 412, it was said by Cameron, C.J.C.P., that, while a defendant was using the plaintiff's invention, he could not dispute the validity of the patent. Other cases to the same effect were cited there also.

In *Evans v. Buck* (1876), 4 Ch.D. 432, it was decided that a counterclaiming defendant could not ask for two inconsistent reliefs.

If the plaintiff were confining his action to his claims under the agreement, he would, no doubt, on the authority of the cases just cited, be entitled to succeed on this motion, but he has not done this; on the contrary, in the 6th and 8th clauses of the prayer for relief he asks an injunction to restrain the defendant company "from infringing his patents" for making Maltose and modified starch.

From the cases it would seem that the defendants might have required the plaintiff to elect, as was said to be the better course in *Gent v. Harrison*, *supra*. But the other course has been taken, no doubt for sufficient reasons.

As it is, the statement of defence cannot be interfered with so as to eliminate the denial of the validity of those patents.

If the plaintiff claims infringement, it is needless to cite authority that such a defence is the one that is adopted almost instinctively as the first and most effectual.

On the other hand, the statement of defence seems to be contrary to the decision in *Liardet v. Hammond Electric Light and Power Co.*, *supra*.

It is not denied that the plaintiff's inventions have been or are being used, and the Court is asked to compel him to carry out fully the agreement in question.

The statement of defence in this respect seems open to attack.

But any benefit resulting from the denial of validity, etc., can be obtained from the allegations in paragraphs 5, 6, 10, 12, and 14, that the inventions have been found useless, and the plaintiff's services wholly without any satisfactory result.



If this is really what is relied on, could not the company safely abandon any claim in respect thereof other than the damages claimed in clause (2) of the prayer for relief for failure of the plaintiff to carry out his agreement and his representations as to the great value of his patents.

It is not for the opposite party nor for the Court to dictate how a litigant should plead, so long as he conforms to the Rules and practice. But, subject to this qualification, it may be suggested that it is for the interest of all parties that it be made clear, first of all, if the plaintiff is proceeding solely to enforce the agreement, either specifically, if this can be done, or by way of damages for the alleged breach of the same by the defendant company. This would require only the excision of the claim of infringement, as already noted.

Thereupon the statement of defence would be amended as the company might be advised; but so as to omit any denial of the validity of the plaintiff's patents.

There does not seem any reason why that exact question should be raised now. The evidence on the issue of the usefulness of the patents will be of quite enough volume and technicality for one trial.

I do not, however, order this course to be taken; if the plaintiff prefers to let the pleadings stand as at present, he can so do.

If my suggestion is adopted by him, the plaintiff should amend forthwith, and the defendant company should plead in a week thereafter.

In either case, the costs of this motion will be in the cause.

The plaintiff appealed from the Master's order.

May 6. The appeal was heard by RIDDELL, J., in Chambers. *Casey Wood*, for the plaintiff.

*D. L. McCarthy*, K.C., for the defendant company.

May 10. RIDDELL, J.:—The case was argued with great ability; and it may be that the result of this motion will be of serious moment in the preparation of the case for trial.

It being a motion to strike out parts of the defence and counter-claim, it is necessary to examine with care precisely what the pleadings say.

Master in  
Chambers.

1910

DURYEA  
v.

KAUFMAN

Riddell, J.

1910

DURYEA

v.

KAUFMAN.

I do not know that I have been able to understand fully what the pleader means to assert; but I have analysed the pleadings as best I could, and hereto annex my analysis.\* The intricacy of the pleadings is manifest; the precise complaint is rather vague and it may be that it will be thought wise to amend.

The many cases cited have been read, and I have endeavoured

#### \*ANALYSIS OF PLEADINGS.

The plaintiff says he is the holder of Canadian patents No. 74297, improvements in method of manufacturing modified starch, No. 106081, improvements in method of manufacturing highly improved starch, and No. 82771, improvements in maltose syrup and sugars: that he is the owner of these patents, the company admit, but deny that they are valid. The parties entered into an agreement, 24th January, 1906, the plaintiff representing therein that he, to the best of his belief, owns and possesses certain Canadian patents and desires commercially to exploit them in Canada. The company agree to furnish space and power, etc., at their factory for the operation of the plaintiff's patents as to modified starches and optionally only to small granules maize starches, the plaintiff to install all new special apparatus, being reimbursed if the company desired to continue to use the plaintiff's special modified process—the company not to be obliged to manufacture to a greater extent than they judge expedient in their own interests. This portion of the agreement was carried out, and the plaintiff reimbursed. The company began and continued the manufacture of modified starches by the plaintiff's method; but the plaintiff complains that they did not employ energetic business methods in marketing the product upon its merits, as they in another clause of the agreement had contracted to do. This charge the company deny; it is not suggested, however, that the company did not manufacture as the plaintiff says.

The plaintiff further alleges that the company, without his permission, have since the 1st January, 1909 (the agreement terminated 31st December, 1908), made use of and sold to others modified starch made by his method, and have infringed and still are infringing patent No. 74297. The company say that they have obtained from the plaintiff the exclusive rights under this patent No. 74297, and are manufacturing under it. In other words, they admit that they are manufacturing according to the patented method, but claim the right to do so under the plaintiff's agreement. So far then as this patent is concerned, the defendant company admit that the plaintiff owns the patent and that they are manufacturing under the process described in the specifications, but say: (a) the company have the right so to do under an agreement with the plaintiff; and (b) the patent is not valid.

As to patent 106081 for highly modified starch, no doubt the part of the contract already set out covers this patent also, as well as No. 74297: the plaintiff does not specifically claim that this is being infringed by the company, as in the case of No. 74297, but he does say: "40. The defendant company has since the 1st day of January, 1909, manufactured and is still manufacturing large quantities of modified starches and glucose according to the plaintiff's said patented processes and special personal confidential methods, and is deriving large profits therefrom, but the defendant company has not . . . offered to pay or paid any royalty or compensation therefor." It would seem that No. 106081 is intended to be referred to in this paragraph, as well as the other patents; and the relief in "(5) for an account of the profits or . . . for the payment of royalties" is directed to this as well as to the others. The defendant company do not admit using the special confidential methods of the plaintiff, but say they have the right to do so under the agreement of January, 1906. There is no express admission of use of the methods of 106081, as there is of those of 74297—so that the case stands that the plaintiff, claiming an account of profits which would arise from a claim of infringement, is in effect claiming that this patent is being

to give an intelligible account of them and the real matters decided—perhaps at much greater length than the decision of the present case really requires.

The case was argued by the plaintiff's counsel as though there was some special rule as to pleadings in an action by a patentee

infringed by the company. The company answer: (a) we do not admit using this patent; (b) if we do, we have the right; and anyway (c) it is not valid.

As to patent No. 82771, for maltose syrup, etc. (maltose is a syrup produced from corn starch, and a wholesome and valuable food product), the plaintiff agrees to develop his special starch syrup processes, and the company may acquire the rights from the plaintiff for the exclusive use for Canada of the processes covered by his existing patents and those discovered by him during the term of his employment, paying a royalty of 5 cents per 100 lbs. The plaintiff says that he did develop his process and demonstrated the success of the improved process, but that the company did not avail themselves of their right to acquire the rights for Canada. He says the company claim that they have acquired such rights and are entitled to use the same; and asks for a declaration that the company are not entitled to any rights under this patent and an injunction restraining the company from infringing this patent.

The defendant company say that the plaintiff did not develop his partially developed syrup method, but that the apparatus furnished by him for the demonstration of maltose was inadequate, that the company were never satisfied by the plaintiff that he had a commercial result, but they claim the right to exercise an option on patent 82771, but so far the company have not been in a position to exercise this right, owing to the default of the plaintiff. The company say, however, that "they do not admit . . . the said process is the proper subject matter of letters patent:" para. 6.

I do not find any admission that the company are manufacturing under this patent: the company ask by counterclaim, however, that "these defendants are entitled under the terms of the said agreement to the benefit of patents No. 74297, 82771, 106081, and 106082, or, in the alternative, for an order that the said patents be declared to be invalid."

In the case of this patent, then, the plaintiff asserts that the company are infringing it and asks for an injunction. The defendants say: (a) do not admit manufacture; but (b) the company have the right from the plaintiff; and (c) in any case the patent is invalid.

Patent 106082, improvements in manufacture of glucose, which the plaintiff says is the ordinary syrup of commerce. The plaintiff says that he owns this patent, and has since improved the methods, that in 1908 he made an oral agreement with the company for the erection of a building, etc., for the exploitation of these methods, that, while they were endeavouring to embody the oral agreement in writing, the company repudiated their obligation to pay him a royalty on the glucose made by his process, but went on then secretly to make glucose according to his methods, and infringed and are infringing his patent 106082, with the assistance of the defendant Kaufman, whom the plaintiff charges with revealing confidential and secret information. He asks for an injunction restraining the company from infringing this patent 106082.

The company admit that the plaintiff obtained this patent, but deny that it is valid; but the company go on to claim this patent under the agreement of January, 1906, or, in the alternative, under that of 1908—they do not admit the using of these methods, and say that commercially, if not chemically, the results of these methods are not satisfactory. So that the plaintiff claims that the company have no right to manufacture according to his methods, and that they are manufacturing by these methods. The company (a) do not admit manufacturing; (b) but, if so, they are entitled to do this under contract; and (c) the patent in any case is invalid.

Riddell, J.

1910

DURYEA  
v.

KAUFMAN.



Riddell, J.  
1910  
DURYEA  
v.  
KAUFMAN.

against one whom he alleges to be using his patented methods. There is no difference in the rules governing pleadings in the High Court in cases of patents and in those governing pleadings in any other ordinary action.

Nor are the rules of pleading in our Courts a thing of darkness and mystery, difficult to be grasped by the ordinary mind, and based upon arbitrary or whimsical principles. These principles are clear and simple and plain common sense. The pleadings must disclose what is to be tried; every pleader is at liberty to allege any fact which would be allowed to be proved, but only such facts. And the facts are to be set out in an understandable form and not left to be inferred by mere conjecture. No pleading can be said to be embarrassing if it allege only facts which may be proved—the opposite party may be perplexed, astonished, startled, confused, troubled, annoyed, taken aback, and worried by such a pleading—but in legal sense he cannot be “embarrassed.” But no pleading should set out a fact which would not be allowed to be proved—that is embarrassing: *Stratford Gas Co. v. Gordon* (1892), 14 P.R. 407; *Heugh v. Chamberlain* (1877), 25 W.R. 742; *Knowles v. Roberts* (1888), 38 Ch. D. 263. Even if a pleading set out a fact that is not necessary to be proved, still, if it can be proved, the pleading will not be embarrassing. Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded—but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result: *Rock v. Purssell* (1887), 84 L.T.J. 45.

Now, when a patentee knows of another person using his patented methods he may say that that other is either (A) right or (B) wrong. He may say that he is (A) right because (1) the patent is invalid and the processes are open to the world, or (2) the user has been licensed by the patentee or he has in some manner, directly or indirectly, received the right so to use the patented methods from the patentee. In the former case, (A) (1), of course, no action lies; in the latter, (A) (2), an action will or will not lie according as the user has or has not agreed expressly or by implication to pay the patentee or do something which is equivalent to paying for the right to use the patent.

If an action is brought for payment, the user may, of course,



deny that he is using the patent under any agreement to pay, etc., or that he is using it at all. But, if he admits the use under the agreement, unless there be an express or implied warranty of the validity of the patent, or fraud is alleged, it is obvious that the validity of the patent is wholly immaterial—he has promised to pay, and the action is on the promise.

He may, of course, plead fraud, which is at the common law a form of *non assumpsit* (though, since the Common Law Procedure Act at least, it must be specifically pleaded), because, when a contracting party discovers the fraud and repudiates the contract for that cause, he asserts that the contract is not in existence—whereas if he does not repudiate, but goes on under the contract, he is considered to have waived the fraud and ratified the contract. The ordinary plea of fraud, therefore contains an averment by implication that the defendant repudiated the contract on discovery of the fraud: *Dawes v. Harness* (1875), L.R. 10 C.P. 166. Such a plea was made in *Lovell v. Hicks* (1836-7), 2 Y. & C. Ex. 46, 472, in which one of two joint owners of a patent by fraud induced the defendant to purchase the use of the patent, which turned out to be of no value. It was necessary to prove the invalidity of the patent in order to establish the fraud. *Hayne v. Malby* (1789), 3 T.R. 438, was really a case of fraud; and *Chanter v. Leese* (1838), 4 M. & W. 295, is another instance. Or the defendant may set up an express warranty of the validity of the patent. That would go to the basis of the contract, and, of course, the invalidity of the patent would require to be proved. In both these cases, the invalidity of the patent could be pleaded as a defence. Cases of an express warranty are such as *Mills v. Carson* (1892), 10 R.P.C. 9; *Wilson v. Union Oil Mills Co.* (1891), 9 R.P.C. 57; *Nadel v. Martin* (1903), 20 R.P.C. 721, 735.

As to an implied warranty, if a warranty could be implied, it would be of the same effect as an express warranty, and the same rules would apply. But the Courts early decided that in the ordinary case of the sale or license of a patent, there is no implied warranty.

In 1857 the question came up in the case of the sale of a patent, *Hall v. Conder* (1857), 2 C.B. N.S. 22. The Court of Common Pleas held that there was no warranty implied in the fact of sale of a patent. In the Exchequer Chamber Lord Campbell, C.J., p. 54,

Riddell, J.  
1910  
DURYEA  
v.  
KAUFMAN.

Riddell, J.

1910

DURYEA

v.

KAUFMAN.

says: "To make anything of this point, there must be either a warranty or fraud;" and the Exchequer Chamber dismissed an appeal from the Common Pleas. The result was, that the vendor of an invalid patent was considered not to have by implication warranted that the patent was a good one. This principle goes back at least to Lord Mansfield's time: *Taylor v. Hare* (1805), 1 B. & P. N.R. 260. So, too, in the case of a license, the same absence of implied warranty was early decided.

It has been thought that *Hayne v. Maltby*, 3 T.R. 438, was to the opposite effect. There the declaration set out that the plaintiff had licensed the defendant to use a patent of his, in consideration of which the defendant covenanted that he would not use any other patented machine or any machines resembling them. The defendant pleaded that the patent was void and was not the plaintiff's. Lord Kenyon (p. 441) said that it was not a covenant to pay a certain sum in gross, but to use a particular machine in a certain way—and so apparently distinguished the case from one of sale or license. Ashurst, J., puts the case on fraud: "The plaintiffs use this patent as a fraud on all mankind." Buller, J., on this: "Here the plaintiffs asserted that they had an exclusive right to a particular machine." Grose, J., concurred. The case does not, it will be seen, go the length supposed; but, if it did, it could not be followed in view of later decisions.

The latest, perhaps, are *Smith v. Buckingham* (1870), 21 L.T.N.S. 819, and *Liardet v. Hammond Electric Light and Power Co.*, 31 W. R. 710; see especially p. 711.

In actions for royalties due for patents, where there is no fraud or express warranty, then the law is well settled. There are many cases in England and in our own Courts, some of which have been cited. *Noton v. Brooks* (1861), 7 H. & N. 499. A patentee, in consideration of a royalty, granted to another a license to use a patented invention. In an action to recover the royalty, the licensee was not allowed to plead the invalidity of the patent: his pleas were struck out on demurrer. *Lawes v. Purser* (1856), 6 E. & B. 930, an action for a royalty: the plea that the patent was void was held bad and struck out on demurrer. *Hall v. Conder*, 2 C.B.N.S. 22, above referred to, is a case of sale—the demurrer was allowed. *Gray v. Billington* (1871), 21 C.P. 288, an action for royalties: demurrer allowed.

In *Vermilyea v. Canniff* (1886), 12 O.R. 164, an action for royalties, fraud was alleged—it was therefore proper to plead invalidity of the patent—but the Chancellor at the trial, having found fraud not established, and reserving judgment upon the question as to the patent being invalid, and as to the plaintiffs' right to recover in case the patent was invalid, held, after consideration, that the invalidity of the patent would be no defence, and consequently he did not pass upon its validity. The learned Chancellor cites also *Dorab Ally Khan v. Abdool Azeez* (1878), L.R. 5 Ind. App. 116, 127. *Owens v. Taylor* (1881), 29 Gr. 210, *Beam v. Merner*, 14 O.R. 412, and *Green v. Watson* (1883), 2 O.R. 627, 634, are other cases of the same kind. And, even if the patent be revoked, the royalty must be paid: *African Gold Recovery Co. v. Sheba Gold Mining Co.* (1897), 14 R.P.C. 660, 663.

The case is indeed not free from authority even in the highest Courts.

In *Crossley v. Dixon* (1863), 10 H.L.C. 293, an action for royalties, the defendant D. agreed with the plaintiff C. to be supplied by C. with machines according to patents of which C. was the owner, and to pay royalties for the use of the machines and for the use of any machines supplied to him by any one else which embodied the principles of C.'s machines. D. in fact was admittedly supplied thereafter by S. with machines, which, C. claimed, embodied his principles, and he claimed a royalty, and also charged D. with an infringement of his patent. D. (1) denied that the agreement was a license; (2) set up that the patents were invalid; (3) denied infringement. The Vice-Chancellor Page-Wood gave a decree in favour of C., directing an issue upon infringement only. The Lords Justices retained the appeal till C. had brought any action he might be advised. The House of Lords reversed the Lords Justices, and held that the proper order was "that the defendant, while he continues to use the machines bought of the plaintiffs under the agreement, is not entitled to use any machine in the construction of which the plaintiffs' inventions . . . would be employed, without paying the royalty, as if the carpet had been manufactured by a machine of the plaintiffs." The Lord Chancellor says (p. 299): "The only question for the Court is the identity of the two sets of machines." At p. 304 the Lord Chancellor, Lord Westbury, says: "The respondent is using the machines

Riddell, J.

1910

DURYEA  
v.  
KAUFMAN.

Riddell, J.  
 1910  
 DURYEA  
 v.  
 KAUFMAN.

which he . . . bought, and is recognising his relation as licensee of the appellants by paying the appellants the royalty, a payment that can be attributed to nothing but to the patent rights in respect of which these machines have been constructed. . . . The contention . . . is this, that, notwithstanding that relation continues, he is at liberty to deny the title of the appellants to the ownership of the inventions, for the use of which he is thus paying a royalty. . . . That is a proposition inconsistent with the law." At pp. 305, 306: "The case resolves itself into a mere question of law, whether the licensee can deny the patent right of the licensor." At p. 306: "As to the validity or the invalidity of the . . . patent rights, a question . . . which could not by possibility arise" since "the original agreement . . . was still in actual continuance . . . it is palpable that so long as the agreement . . . continued . . . it would . . . have been impossible . . . to bring an action for an infringement. . . ." Lord Chelmsford (p. 310) says: "The question . . . is, . . . whether, being under an agreement to pay certain royalties for goods manufactured by the plaintiffs' looms, and any other looms embodying their inventions, he is, while that agreement is subsisting, at liberty to use those inventions, and to refuse to pay the royalties . . . that he cannot do. . . . He cannot act under the agreement, and, at the same time, repudiate it. He may, if he pleases, put an end to the agreement, and he may use the machines which he has purchased from the plaintiffs; but he must do so at his peril; he must do so under the liability to be treated as an infringer. and to be subject to an action for damages for that infringement."

This is called "estoppel" in the digests and some of the text-books; the word is not used, I think, in the judgments. But the terminology is employed later by at least one of the Lords in *Cam. Sacc.*

In another action for royalties, *Clark v. Adie* (No. 2) (1877), 2 App. Cas. 423, Adie had a patent; Clark wrote agreeing to take a license under Adie's patent and to pay a stated royalty on each article sold. This offer was accepted. Clark insisted afterwards that the articles which he sold were not made under Adie's but under his own and one G.'s patents. In the House of Lords the Lord Chancellor (Lord Cairns) said (p. 425) that C. taking a license



to work A.'s patent "as between the . . . licensee and . . . the patentee (whatever strangers might have to say as to the validity of this patent), the question of validity must be taken as that which the appellant (the licensee) is unable to dispute. So far as he is concerned, he must stand here admitting the novelty of the invention, admitting its utility, and admitting the sufficiency of its specification. . . ." Lord Hatherley says (p.432): "The licensee could not deny the validity of the patent. . . ." Lord Blackburn (p. 435): "The position of a licensee who under a license is working a patent right, for which another has got a patent, is very analogous indeed to the position of a tenant of lands who has taken a lease of those lands from another. . . . He is estopped from denying that his lessor had a title to that land. . . . Now a person who takes a license from a patentee, is bound upon the same principle and in exactly the same way. . . . So may a licensee under a patent shew that, although he accepted the license . . . and the patentee could never, therefore, so long as that license was in existence, bring an action against him as an infringer, yet . . . if he has used that which is in the patent, and which his license authorises him to use without the patentee being able to claim against him for infringement, because the license would include it, then, like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty. Although a stranger might shew that the patent was as bad as any one could wish it to be, the licensee must not shew that." At p. 437: "It seems to me . . . that Clark has in fact used the patent whilst he had a license to use it, and that, having used it in that way, and there being nothing analogous to an eviction, or other mode of terminating the license, he is as much bound to pay the royalty rent as a tenant, in the analogous case, would be bound to pay the rent for the land." Lord Blackburn does not mean that a feudal relationship arises between licensor and licensee, as in the case of landlord and tenant—that any privity of estate is to be found between them.

Not all the incidents of a tenancy follow the granting of a license; *e.g.*, while a tenant is not allowed to deny his landlord's title, even after the termination of a lease, unless and until he gives up his possession of the premises (*Doe dem. Manton v. Austin* (1832), 9 Bing. 41; *Eliot v. Mayor, etc., of Bristol* (1894), 71 L.T.

Riddell, J.  
1910  
DURYEA  
v.  
KAUFMAN.

Riddell, J.

1910

DURYEA

v.

KAUFMAN.

659, at p. 663), the licensee is at liberty in any case after the termination of the license to dispute the validity of the patent. This will appear from the modification made by the House of Lords in the decree of the Vice-Chancellor in *Crossley v. Dixon*, 10 H.L.C. 293.

The judgment in *Clark v. Adie* (No. 2) must be read in connection with the facts: *Quinn v. Leathem*, [1901] A.C. 495, at p. 506; and confined to the case there being considered of recovery of royalties agreed to be paid.

That there is any general estoppel of a vendee or licensee of a patent against disputing the validity of the patent may, perhaps, be doubted. The text-writers differ in their way of expressing the rule. Frost, 3rd ed., vol. 2, p. 148, says: "A licensee . . . is . . . estopped during the continuance of the license from denying that validity . . . ; he is so estopped independent of estoppel by deed; and even when he has used the invention under a mere verbal agreement." All the cases cited by the learned author are either cases of estoppel by deed or actions for royalty without express warranty or fraud. Charles, J., puts it in the last case cited by the author, *Wilson v. Union Oil Mills Co.*, 9 R.P.C. 57, at p. 63, thus: "A man has no right to work the patent of another without inquiry for a long time under an agreement whereby he has contracted to pay royalty, and then, when he is called upon to pay royalty, to say, 'Oh, your patent; after all, is an invalid patent.' " Frost, in vol. 1, p. 409, is much more guarded, and, in my judgment, more accurate.

Terrell, 4th ed., p. 218, puts the proposition more accurately thus: "Unless the licensor has covenanted for the validity of the patent in express terms, the licensee will be estopped from alleging its invalidity in answer to an action for royalties, even though the patent has been declared void in other proceedings."

That the estoppel is not general and absolute is seen in the case of *Pidding v. Franks* (1849), 1 Macn. & G. 56. There the equitable assignees of a patent had, it was charged, adulterated the coffee made under the patent and sold it in the patentee's packages. In a suit for an injunction the defendants disputed the validity of the patent. The Vice-Chancellor (Knight Bruce) refused to put the defendants on terms not to dispute the validity of the patent, while he granted an interim injunction. Upon

motion to vary the order, Lord Cottenham, L.C., said: "Are the defendants not to be at liberty to say, we have bought the patent and paid for it, but we do not intend to use it: they are mere equitable assignees, and why should they be deprived of the right, which every stranger has, of disputing the validity of the patent?" Of course, in this case the defendants, in addition to disputing the validity, disclaimed the use of the patent.

But in an Irish case, *Baxter v. Combe* (1850), 1 Ir. Ch. R. 284, the Irish Master of the Rolls decided that an agreement to purchase a license to use a patent will not in equity preclude a party from disputing its validity. While Page Wood, V.-C., in *Dangerfield v. Jones* (1865), 13 L.T.N.S. 142, at p. 143, says: "They (*i.e.*, the defendants) took out a license from the plaintiff to use the machines in their trade. Now, I do not mean to say that binds them in any way, or that it operates by way of estoppel." This case does not assist, however, as the dispute arose after the revocation of the license.

I do not consider it at all necessary to pursue the very interesting inquiry further.

This class of case is, as we have seen, often said to establish that the licensee or vendee is estopped from setting up the invalidity of the patent; but the word "estoppel" is, perhaps, not properly applicable to instances of this kind.

There are, however, cases in which the doctrines of estoppel are more properly applicable and the name applied. For instance, when one holding himself out to be a patentee under a valid patent, sells the patent or gives a license to use it, he is not permitted thereafter, as against his vendee or licensee, to set up that the patent is invalid. This may be called "estoppel," prohibition against "derogating from his own grant," or any other name considered suitable may be given to it—but there is no doubt of the existence of the rule.

As far back as 1789 Lord Kenyon, in *Oldham v. Langmead* (Sittings after Trinity, 1789, referred to in *Hayne v. Maltby*, 3 T.R. 438, at pp. 439, 441), where the patentee had conveyed his interest to the plaintiff, and, in violation of his contract, afterwards infringed the plaintiff's right, and then attempted to set up the invalidity of the patent, held that the patentee was estopped by his own deed from making that defence.

Riddell, J.

1910

DURYEA  
v.

KAUFMAN.

Riddell, J.

1910

DURYEA

v.

KAUFMAN.

In *Chambers v. Crichley* (1864), 33 Beav. 374, the defendant assigned to the plaintiffs all his interest in a patent, and afterwards used the patent with improvement; then he tried to set up that the original patent was bad. Sir John Romilly, M.R., said, p. 376: "This is certain, that the defendant sold and assigned that patent to the plaintiffs as a valid one, and having done so, he cannot derogate from his own grant. It does not lie in his mouth to say that the patent is not good."

In *Whiting v. Tuttle* (1870), 17 Gr. 454, the defendant obtained a patent and assigned it to the plaintiffs. He thereafter began manufacturing under the same process. The Court, in a suit for infringement, held that the defendant could not dispute the plaintiff's title to the patent on the ground of want of novelty, and granted an injunction. Strong, V.-C., at p. 455, puts it upon the ground that "the patentee in such a case will be restrained from derogating from his own grant."

In *Gillies v. Colton* (1875), 22 Gr. 123, at p. 129, Proudfoot, V.-C., says: "Having determined that Colton had an interest in the patent, and that he has, by a deed, granted this to Collard, the question of whether he is estopped from derogating from his grant seems covered by authority;" and this was held by Blake, V.-C., at the trial, 22 Gr. at p. 132. This is not unlike *Walton v. Lavater* (1860), 8 C.B.N.S. 162.

The latest case in any of the Courts which I have met with is *Gonville v. Hay* (1903), 21 R.P.C. 49.

This is, perhaps, a more accurate use of the word "estoppel." But there can be no good end attained by pursuing this inquiry.

I pass on to the other case (B). The defendant is said to be a wrongdoer—he is charged with using the patented methods without the license of the patentee—in short, the defendant is charged with infringement. The defendant cannot be charged with infringement unless either he never had a license or his license has come to an end by revocation, lapse of time, or other methods. There is some authority for the proposition that in case of the termination by lapse of time of the license the patentee can sue either for royalty or for infringement: Walker on Patents, 4th ed., sec. 309. But in such a case the defendant has the same rights and may interpose the same defences as if he never had a license.

The analysis to which the pleadings have been submitted shews that in the case of each patent infringement is claimed.



In respect of patent No. 74297, the plaintiff says that the company, without the license, permission, and consent of the plaintiff, has since the 1st January, 1909, made use of the processes of this patent (32), and that they will continue to infringe unless restrained.

In respect of patent No. 106081, the allegation is, perhaps, not quite so plain, but I cannot read the statement of claim as not claiming infringement.

In respect of patent No. 82771 (Maltose), he claims that they never acquired the right to use this and have none, and he asks an injunction restraining infringement.

In respect of patent No. 106082, he says that, while they were trying to embody an agreement in writing, the company repudiated the oral agreement, and are now infringing.

Such being the claim, the defendants are at liberty to attack the validity of the patents.

It is quite true that if at the trial it is proved, as apparently the defendant company desire to do, that there is an existing and valid license to the company, the plea of invalidity of the patents will not be of any avail, as turned out to be the result in the *Vermilyea* case, in 12 O.R. 164. But there is no reason why at present the company may not set up inconsistent defences: see *Holmsted & Langton*, at p. 440, and cases cited; *Allen v. Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 510, at pp. 516, 517.

As to the counterclaim, I have decided that in the defence the company may prove the invalidity of the patents; and I have further said that the company may counterclaim for a declaration to that effect. If the company have added other claims in the counterclaim which are inconsistent and embarrassing, it is possible that the Court may deal with this defendant as the Court did with the plaintiff in *Evans v. Davis*, 27 W.R. 285, in the way of costs.

The pleadings are in general intended to shew the facts upon which the party relies, and the Court will grant only the relief to which the facts proved are applicable and justify. While it would be going too far, perhaps, to say that in no case would the Court upon motion strike out a paragraph of the prayer, such a case must be rare. No doubt, Con. Rule 273 provides that in a counterclaim, as in a statement of claim, the relief claimed is to

Riddell, J.

1910

DURYEA  
v.

KAUFMAN.

Riddell, J.

1910

DURYEA

v.

KAUFMAN.

be stated either simply or in the alternative; but it is well decided that a prayer for general relief will justify the Court in granting any relief justified by the facts: *Watson v. Hawkins* (1876), 24 W.R. 884; *Slater v. Canada Central R.W. Co.* (1878), 25 Gr. 363. No harm can accrue to the defendant in the counterclaim from the company asking too much, where the facts upon which the company rely are set out, and the evidence to prove such facts is admissible in another part of the case.

Moreover, the express words of Con. Rule 273 allow the relief to be claimed in the alternative, which is what has been done in this case.

The appeal will be dismissed, with costs to the defendant company in any event of the action.

---

[DIVISIONAL COURT.]

D. C.

1910

May 10.

LAURIE V. CANADIAN NORTHERN R.W. CO.

*Railway—Carriage of Goods—Failure to Deliver—Fault of Connecting Carrier—Transport by Sleigh-road—Contract—Conditions Relieving Railway Company—Common Carriers—Tort—Railway Act, sec. 284.*

The plaintiff delivered to the defendants lumber to be forwarded to G. station, subject to the conditions of the shipping bill, and paid the freight to G. The lumber was conveyed to S., the station nearest to G. on the defendants' line. The only transportation possible from S. to G. was over a sleigh-road by teams owned by a transport company, with whom the defendants had a working arrangement. The car containing the lumber was left on a siding at S., and the agent of the transport company was notified, but that company did not forward the lumber to G., and the defendants shipped it back to the plaintiff without delay, and returned the freight. By clause 10 of the conditions on the back of the shipping bill it was, *inter alia*, provided that the defendants did not contract for the safety or delivery of any goods except on their own lines, and that where a through rate was named to a point on other lines, the defendants were to act only as agents of the owner of the goods as to that portion of the rate required to meet the charges on such other lines, and that their responsibility in respect of any loss, misdelivery, or detention of goods carried under the contract should cease as soon as the defendants should either deliver them to the next connecting carrier for further conveyance or notify such carrier that they were ready to do so:—

*Held*, in an action for breach of the contract by non-delivery of the goods, that this clause relieved the defendants; "the next connecting carrier" was not limited to a railway company operating other lines, but meant any connecting carrier.

Clause 15 provided that the defendants should not be liable for loss of market or for claims arising from delay or detention of any train in the course of its journey, and any loss or damages for which the defendants might be responsible should be computed upon the value or cost of the goods at the place and time of shipment:—

*Held*, that this clause also applied; the immunity from liability for loss of market was not limited to claims arising from delay or detention of any train, but was general.

*Held*, also, that, there being a limitation under the contract itself, the law applicable to common carriers did not apply.

*Held*, also, that the plaintiff was not entitled to succeed as in an action for tort, as the defendants received the lumber for carriage under the provisions of a special contract.

*Held*, lastly, that the defendants had fulfilled their obligations under the contract, and were not liable under sec. 284, clauses (b), (c), and (d), of the Railway Act, R.S.C. 1906, ch. 37.

Judgment of MAGEE, J., affirmed.

D. C.

1910

LAURIE

v.

CANADIAN

NORTHERN

R.W. Co.

APPEAL by the plaintiff from the judgment of MAGEE, J., dismissing the action.

The following statement of the facts is taken from the judgment of CLUTE, J.:—

The plaintiff, a lumber manufacturer of Parry Sound, delivered to the defendants at their siding at James Bay Junction, in the district of Parry Sound, a car of dressed lumber, "to be forwarded by the said company to Gowganda station, subject to the terms and conditions . . . upon the other side of the shipping bill which is delivered to the company and accepted by the consignor . . . as the basis upon which this receipt is given for the said property, and it is agreed to by the consignor as a special contract in respect thereof."

The freight to Gowganda—\$643.45—was paid by the plaintiff to the defendants. Among the conditions indorsed on the shipping receipt are the following:—

"3. The company is not to be liable for damages occasioned by delays caused by storms, accidents, overpressure of freight, or unavoidable causes, or by the weather or wet, fire, heat, frost, or delay, of perishable articles, or from civil commotion."

"6. The company's obligation to carry and deliver lumber and coal, bricks, and any other goods carried by the car-load shall be fulfilled and the company's responsibility in respect thereof shall cease upon the car in which they are carried being detached from the train at the station on the company's lines to which it is consigned, if it leaves the company's lines. The expression 'the company's lines' in this document mean one or more of the lines of railway operated by the company, and the expression 'other lines' means a railway or railways operated by some other company or companies."

"10. It is hereby expressly agreed that the company does not

D. C.  
1910  
LAURIE  
v.  
CANADIAN  
NORTHERN  
R.W. Co.

contract for the safety or delivery of any goods except on the company's lines, and where a through rate is named to a point on other lines, it is on the understanding that the company is to act only as agent of the owner of the goods as to that portion of the said rate required to meet the charges on such other lines; and if any goods be consigned to a place on other lines, then, unless some connecting carrier be named on the other side of this document, the goods are to be handed over by the company for further conveyance to such carrier, and at such place on the company's line as the company may select; if one be so named the company will hand over such goods to the one so named, if practicable; in either case the company, in so handing over the goods, shall be held to be the agent of the owner, it being expressly agreed that the responsibility of the company in respect of any loss, misdelivery, or detention of or damage or injury, by any means whatsoever, to any goods carried under this contract, shall cease as soon as the company shall either deliver them to the next connecting carrier for further conveyance, or notify such carrier that it is ready to do so."

"15. The company shall not in any case, or under any circumstances, be liable for loss of market or for claims arising from delay or detention of any train in the course of its journey, or any of the stations on the way, or in starting, and the company does not undertake to load or send goods upon or by any particular train, if there is an insufficient number of cars at any station, or if the cars cannot be conveniently used for the purpose, or if, from any cause, cars loaded at a station are unable to be sent off by the train passing, or starting from such stations, and any loss or damage for which the company may be responsible shall be computed upon the value or cost of the goods or property at the place and time of shipment under this shipping bill."

The car of lumber was conveyed to Selwood, the station nearest to Gowganda on the defendants' line, having been shipped on the 11th and arriving on the 12th March, 1909. The only transportation possible from Selwood to Gowganda was by the Gowganda Transport Company, by teams over a sleigh-road, impassable except during the winter season. The transport company was an independent organization.

On the arrival at Selwood, the car containing the lumber was



detached and left on the siding ready for transshipment, and the agent of the Gowganda Transport Company was notified by the delivery to him at Selwood of the shipping bill, but, owing either to accumulation of more freight at Selwood than the transport company could handle, or for other cause, the lumber was not forwarded to Gowganda from Selwood. The defendants shipped the lumber back to the plaintiff without delay, and returned the freight paid to them.

This action is brought for breach of contract, for non-delivery, and damages for loss of profits.

The defendants rely upon the above conditions as a defence to this action.

The trial Judge dismissed the action with costs.

April 18 and 19. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

*H. H. Dewart*, K.C., and *H. E. Stone*, for the plaintiff. There was a breach of duty on the part of the defendants in not delivering the lumber under the terms of the shipping bill, and also a liability in tort in that the defendants were guilty of negligence in neglecting to forward the lumber to Gowganda. The sleigh-road was part of the defendants' line, and not a connecting line. The defendants' liability did not cease when the car of lumber was detached at Selwood; and the 6th condition in the contract between the parties applied only to cases of through shipment by rail where the car itself was detached and forwarded. The constructive delivery by notice only applies as between rail carriers, and is the result of custom. The conduct of the agent of the defendants in the handling and forwarding of the car amounted to negligence. Condition number 10 expressly relates to all-rail carriage where a through rate is named to a point on "other lines" of railway, that is, railways operated as described in the 6th condition, by some company other than the defendants, and does not apply to the forwarding of lumber by sleigh-road. There was a complete contract to deliver the lumber at Gowganda. This was never fulfilled, and the defendants are liable for failure to deliver. Both parties knew there was a sleigh-road, and, if it was intended that it should be considered a connecting line, it should have been explicitly so stated. There was no effective

D. C.  
1910  
LAURIE  
v.  
CANADIAN  
NORTHERN  
R.W. Co.

D. C.  
1910  
LAURIE  
v.  
CANADIAN  
NORTHERN  
R.W. Co.

arrangement binding the transport company to receive and deliver, and therefore the defendants had no right to hold out the transport company as a company which would deliver the lumber. The transport company were simply the cartage agents of the defendants, and the latter never parted with possession of the lumber. The damages arose from the negligence and omission of the defendants and their agent at Selwood, under sec. 284, clauses (b), (c), and (d), of the Railway Act, R.S.C. 1906, ch. 37. Under sub-sec. 7 of sec. 284, the defendants, having been guilty of negligence, are not relieved by the notice said to have been delivered to the agents of the Gowganda Transport Company at Selwood. The defendants were grossly negligent in accepting lumber at all for shipment to and delivery at Gowganda, knowing the congestion of traffic at Selwood. If the 10th condition of the bill of lading is valid, it is not within sec. 340 of the Railway Act, as a condition "impairing, restricting, or limiting the liability" of the defendants in respect of the carriage of traffic, and the approval of this condition by the Board of Railway Commissioners does not relieve the defendants from their liability in damages. The Board cannot exempt a company totally from liability. The powers granted under sec. 340 are about matters of toll. All the sections from 314 to 360 inclusive are under the heading of "Tolls," and refer to them. Reference to *Muschamp v. Lancaster and Preston Junction R.W. Co.* (1841), 8 M. & W. 421; *McGill v. Grand Trunk R.W. Co.* (1892), 19 A.R. 245; *Bristol and Exeter R.W. Co. v. Collins* (1858), 7 H.L.C. 194; *McMillan v. Grand Trunk R.W. Co.* (1886-8), 12 O.R. 103, 15 A.R. 14; *Grand Trunk R.W. Co. v. McMillan* (1889), 16 S.C.R. 543, at p. 549; *Richardson v. Canadian Pacific R.W. Co.* (1890), 19 O.R. 369, at p. 377; *Lake Erie and Detroit River R.W. Co. v. Sales* (1896), 26 S.C.R. 663, 676; *Allen v. Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 510, 519; *James (F. T.) Co. v. Dominion Express Co.* (1907), 13 O.L.R. 211; *Mallet v. Great Eastern R.W. Co.*, [1899] 1 Q.B. 309; *Johnson v. Midland R.W. Co.* (1849), 18 L.J.N.S. Ex. 366; *Merchants Despatch Transportation Co. v. Hately* (1887), 14 S.C.R. 572; *Grand Trunk R.W. Co. v. Vogel* (1886), 11 S.C.R. 612; *The Queen v. Grenier* (1899), 30 S.C.R. 42; *Robertson v. Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611; *Armstrong v. Michigan Central R.W. Co.* (1902), 1 O.W.R. 714; *Mahony v. Waterford Limerick and Western*

*R.W. Co.*, [1900] 2 I.R. 273; *Whitman v. Western Counties R.W. Co.* (1884), 17 N.S.R. 405, 409; *Beal v. South Devon R.W. Co.* (1864), 3 H. & C. 337, 341; *North-West Transportation Co. v. McKenzie* (1895), 25 S.C.R. 38, at p. 44; *Owners of Cargo on Board S.S. Waikato v. New Zealand Shipping Co.*, [1898] 1 Q.B. 645, 647, [1899] 1 Q.B. 56; *McNamara's Law of Carriers by Land*, 2nd ed., pp. 77, 78; *Price v. Union Lighterage Co.*, [1904] 1 K.B. 412; *Hooper v. London and North Western R.W. Co.* (1880), 50 L.J. N.S.C.L. 103; *Martin v. Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9; *Hadley v. Baxendale* (1854), 9 Ex. 341; *Horne v. Midland R.W. Co.* (1872), L.R. 7 C.P. 583, at p. 590; *Collard v. South Eastern R.W. Co.* (1861), 7 H. & N. 79; *Schulze v. Great Eastern R.W. Co.* (1887), 19 Q.B.D. 30; *Craies on Statute Law*, 4th ed., p. 98, and *Mersey Docks and Harbour Board v. Henderson* (1888), 13 App. Cas. 595, 599, there referred to.

*I. F. Hellmuth*, K.C., and *G. F. Macdonnell*, for the defendants. The whole contract is contained in the bill of lading, and both parties are bound by it. The negotiations cannot be looked at when you have the contract itself: *Dominion Coal Co. v. Dominion Iron and Steel Co.*, [1909] A.C. 293. But, in any event, the plaintiff knew when he entered into the contract that there was no connecting line of railway. The Board of Railway Commissioners has approved of the form of contract, and so it cannot be questioned. See sec. 340 of the Railway Act. There is no total exemption from liability here. Therefore the right to make the contract is established. Section 340 of the Railway Act is not limited to tolls in its application. The only duty of the defendants was to carry the lumber to Selwood, and either deliver it to the connecting carrier, or notify him: *Jenckes Machine Co. v. Canadian Northern R.W. Co.* (1909), 14 O.W.R. 307. Neither was there any negligence on the part of the defendants' agent at Selwood. The defendants are in no way liable in tort, as they received the lumber for carriage under the terms and provisions of a special contract. There could be nothing but breach of contract. As to sec. 284 of the Railway Act, the defendants have complied with all of its requirements. This action is wrongly constituted, as any remedy the plaintiff might have would be against the Gowganda Transportation Company. No contract with the latter would be necessary, as the action would be one of tort.

D. C.

1910

LAURIE

v.

CANADIAN  
NORTHERN  
R.W. Co.

D. C.

1910

LAURIE

v.

CANADIAN  
NORTHERN  
R.W. Co.

Clute, J.

*Stone*, in reply. Condition 15 of the bill of lading does not apply here, because this is not a case of delay, but of non-delivery.

May 10. The judgment of the Court was delivered by CLUTE, J. (after setting out the facts as above):—It is clear, I think, that clause 3 of the conditions does not apply to the present contract, because there was no delay from the causes therein specified, on the defendants' line.

Neither does clause 6 apply, as it has reference to a car being detached from the train at the station on the company's lines to which it is consigned, or at the station where, in the usual course of business, it (that is, the car) leaves the company's lines. Here the car did not, and was not intended to, leave the company's line.

I think, however, that clause 10 does apply. The earlier part of the clause is general, and declares that the company does not contract for the safety or delivery of goods except on the company's lines. It then provides that where a through rate is named to a point on "other lines" (which means, as defined by clause 6, a railway operated by some other company), the company is to act only as the agent of the owner of the goods, "it being expressly agreed that the responsibility of the company in respect of any loss, misdelivery, or detention of or damage or injury, by any means whatsoever, to any goods carried under this contract, shall cease as soon as the company shall either deliver them to the next connecting carrier for further conveyance, or notify such carrier that it is ready to do so."

"The next connecting carrier" is not limited here to a railway company operating "other lines," but means, I think, any connecting carrier.

I also think that clause 15 applies, which provides that the company shall not in any case, or under any circumstances, be liable for loss of market or for claims arising from delay or detention of any train in the course of its journey . . . and any loss or damage for which the company may be responsible shall be computed upon the value or cost of the goods at the place and time of shipment under the shipping bill. The immunity from liability for loss of market here stipulated for is not limited to "claims arising from delay or detention of any train," etc., but



is general, and the last clause makes it clear that the loss or damage is to be computed on the value or cost of goods at place of shipment. In this case the lumber, on its return to the plaintiff's siding, had not in fact depreciated in value.

It was strongly urged that the law applicable to common carriers applied in the present case—"that where common carriers take into their charge goods directed to a particular place, and do not by positive agreement limit their responsibility to their own lines, that is *prima facie* evidence of an undertaking on their part to carry the goods to the place directed, although the place may be beyond the limits within which they in general profess to carry on their business of carriers," as laid down by Burton, J.A., in *McGill v. Grand Trunk R.W. Co.*, 19 A.R. 245, at p. 246.

So in *Jenckes Machine Co. v. Canadian Northern R.W. Co.*, 14 O.W.R. 307, 311, where the law is thus expressed by Garrow, J.A.: "It is doubtless the law that if a carrier accepts, as he may do, goods to be carried to a point beyond his own line at a through rate, there is a presumption from these facts of a through contract, which, unless otherwise limited, would render him liable for the act of an intermediate carrier. But the presumption is clearly only one of fact, and not of law, and may, like all similar presumptions, be inquired into. And, if there is other evidence, the whole must be considered together."

In the present case, if my construction of the contract is correct, there was a limitation under the contract itself, and the numerous cases referred to where no such limitation exists are inapplicable, and it becomes unnecessary further to refer to them.

It was further contended that there was no effective arrangement binding the Gowganda Transport Company to receive and deliver, and therefore the defendants had no right to hold out the Gowganda Transport Company as a company who would deliver the lumber. The evidence, I think, displaces this contention. There was, in fact, an arrangement, such as is usually made, that the transport company would receive and forward goods delivered to them by the defendants. I do not mean that there was a formal written agreement of that kind, but there was an understanding—a working arrangement—to that effect. In fact, the defendants were the only carriers to whom the transport company could look for freight to be transported from Selwood

D. C.

1910

LAURIE

v.

CANADIAN  
NORTHERN  
R.W. Co.

Clute, J.

D. C.

1910

LAURIE

v.

CANADIAN  
NORTHERN  
R.W. Co.

Clute, J.

to Gowganda, and this constituted the principal part, if not the whole, of their business.

Neither is the plaintiff entitled to succeed as in an action for tort, as the defendants received the lumber for carriage under the terms and provisions of a special contract: *Lake Erie and Detroit River R.W. Co. v. Sales*, 26 S.C.R. 663, 667. And by this special contract, if I am right in the construction I have placed upon it, the defendants have expressly limited their obligation, both as to liability and damages, so as to exclude the plaintiff's right to recover.

It was also urged that the defendants were liable under sec. 284, clauses (b), (c), and (d), of the Railway Act, R.S.C. 1906, ch. 37. That section provides that the company shall (b) furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic; (c) without delay, and with due care and diligence, receive, carry and deliver all such traffic; and (d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying and unloading and delivering such traffic.

In the present case there was and could be no complaint of the prompt and safe receipt and carriage of the lumber on the defendants' line. It was also clear, I think, from the evidence that the defendants did all things necessary for its delivery to the Gowganda Transport Company.

If the conditions in the contract apply, as above indicated, then I find nothing in the evidence to shew that the defendants did not fulfil the same, and in returning the freight charges and the lumber the defendants did all that they were called upon to do under the circumstances.

The appeal should be dismissed with costs.

## [DIVISIONAL COURT.]

REX V. ACKERS.

D. C.

1910

May 10.

*Liquor License Act—Conviction—Jurisdiction of Justices—Request of Police Magistrate not Appearing—R.S.O. 1897, ch. 87, sec. 22—Habeas Corpus—Motion for Discharge—Amendment of Conviction—Application of sec. 105 of Liquor License Act—Warrant of Commitment—Variance—Costs—Penalty—Informant—License Inspector—Return by Justices of Amended Conviction.*

The defendant was convicted by two Justices of the Peace of an offence against the Liquor License Act. The initiatory proceedings were taken before a Police Magistrate, and it did not appear upon the face of the conviction (though it was the fact) that the Justices were acting at the request of the Police Magistrate:—

*Held*, upon motion to discharge the prisoner from custody under a warrant of commitment based upon the conviction, that, having regard to the provisions of R.S.O. 1897, ch. 87, sec. 22, the conviction was bad because it did not shew the jurisdiction of the Justices; but the Court ordered that the prisoner should be further detained and the conviction amended under the Liquor License Act, sec. 105.

*Held*, also, that it was not a ground for discharge that the warrant of commitment did not conform to the conviction, in that the conviction did not state the costs and charges of conveying the defendant to gaol; the statement of the costs in the warrant was sufficient.

*Held*, also, upon an objection that the proper distribution of the penalty was not determinable upon the face of the proceedings, that it was sufficient that it appeared from the information that the informant was a license inspector, and that the conviction declared that the fine imposed should be paid and applied according to law.

Objections that the Justices, having drawn up and returned to the Clerk of the Peace an order for the payment of money, could not afterwards file any conviction with him, that no minute of such order was made before commitment, and that an amended conviction could not be put in after the enforcement of the fine and costs by imprisonment, were also overruled.

MOTION by the defendant, upon the return of a writ of *habeas corpus*, for his discharge from custody.

A motion for a writ of *habeas corpus* was refused by BOYD, C., but granted, upon appeal, by a Divisional Court. See *Rex v. Akers* (1910), 1 O.W.N. 585, 672.

The following statement of facts is taken from the judgment of CLUTE, J.:—

The information was laid by Hugh Walker, license inspector, against James Ackers, before Stewart Masson, Police Magistrate in and for the city of Belleville and the south part of the county of Hastings, for an offence against the Liquor License Act.

Upon the information the Police Magistrate issued a summons to Ackers to appear at the town-hall of the village of Stirling, before him as such Police Magistrate, or before such other Justices of the Peace having jurisdiction as might then be there, to answer

D. O.  
1910  
REX  
v.  
ACKERS.

to the said complaint, and be further dealt with according to law. The intention was that the case should be dealt with by the local Magistrates.

The Police Magistrate did not attend on the return of the summons, but verbally requested Magistrate Bird to get another Magistrate to sit with him, which he did, and the case was heard by these two Justices of the Peace at the village of Stirling, and before them the prisoner appeared and pleaded guilty to the charge, and thereupon, on the 3rd March, 1910, he was convicted and ordered to pay a fine of \$100, or, in default thereof, to be imprisoned for three months.

The objections taken in the notice of motion are as follows:—

(1) That the convicting Magistrates had no jurisdiction to convict the prisoner, the initiatory proceedings having been taken before a Police Magistrate, and no request to act for him, or his illness or absence, appearing.

(2) That the Magistrates, having drawn up and returned to the Clerk of the Peace an order for the payment of money, could not afterwards file any conviction with him, and no minute of such order was made before commitment.

(3) That an amended conviction could not be put in after the enforcement of the fine and costs by imprisonment.

(4) That it cannot be learned from the proceedings whether the informant was a license inspector or a private individual, so that the rightful distribution of the penalty should ensue.

(5) That the warrant of commitment recites a bad conviction, and does not conform with either of the convictions returned.

(6) That no minute appears to have been made out, and the contingent punishment is unauthorised.

April 20 and 21. The motion to discharge from custody was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

*J. B. Mackenzie*, for the motion. The convicting Magistrates had no jurisdiction to convict the prisoner, the initiatory proceedings having been taken before a Police Magistrate, and no request to act for him, or his illness or absence, appearing: R.S.O. 1897, ch. 87, sec. 22; *The Queen v. Lyons* (1892), 2 Can. Crim. Cas. 218; *Regina v. Clancey* (1876), 7 P.R. 35, at p. 37; *Rex v.*



*Duering* (1901), 2 O.L.R. 593; *Briscoe v. Stephens* (1824), 2 Bing. 213; *In re Peerless* (1841), 1 Q.B. 143; *Carratt v. Morley* (1841), 1 Q.B. 18; *The Queen v. Martin* (1843), 2 Q.B. 1037, at p. 1041; *Peacock v. Bell and Kendal* (1679), 1 Saunders 73; *The Queen v. Inhabitants of the Parish of St. George's Bloomsbury* (1855), 4 E. & B. 520; Paley on Summary Convictions, 8th ed., p. 32. An amended conviction could not be put in after the enforcement of the fine and costs by imprisonment. It cannot be learned from the proceedings whether the informant was a license inspector or a private individual, so that the rightful distribution of the penalty should ensue: see R.S.O. 1897, ch. 245, sec. 90, amended by 9 Edw. VII. ch. 82, sec. 18 (O.) The warrant of commitment recites a bad conviction, and does not conform with either of the convictions returned: *The King v. Townsend* (No. 3) (1906), 11 Can. Crim. Cas. 153; *In re McCall* (1865), 2 U.C.L.J.N.S. 16; *Chaddock v. Wilbraham* (1848), 5 C.B. 645.

*J. R. Cartwright*, K.C., for the Crown. Although the conviction does not disclose on its face that the Magistrates were acting at the request of the Police Magistrate, yet the fact was that they were so acting, and, when this is so, the request need not appear on the face of the proceedings: *Regina v. Shaw* (1864), 23 U.C.R. 616. The conviction can be amended under sec. 105 of the Liquor License Act, R.S.O. 1897, ch. 245, amended by sec. 30 of 6 Edw. VII. ch. 47 (O.)

*Mackenzie*, in reply. The request must appear affirmatively on the face of the proceedings: *Rex v. Holmes* (1907), 14 O.L.R. 124, at p. 128. The conviction cannot now be amended under sec. 105 of the Liquor License Act, which gives only a limited power of amendment, not extending this far. The prisoner has a right to know from the moment of conviction that the right person is directed to get the costs: *The Queen v. Burtress* (1900), 3 Can. Crim. Cas. 536.

May 10. The judgment of the Court was delivered by CLUTE, J. (after setting out the facts as above):—By R.S.O. 1897, ch. 87, sec. 22, it is provided that “no Justice of the Peace shall . . . adjudicate upon or otherwise act until after judgment in any case prosecuted under the authority of any statute of Ontario where the initiatory proceedings were taken by or before a Police Magis-

D. C.  
1910  
REX  
v.  
ACKERS.

D. C.  
1910  
REX  
v.  
ACKERS.  
Clute, J.

trate, except at the General Sessions of the Peace, or in the case of the illness, or absence, or at the request, of the Police Magistrate," etc.

In the present case no request in writing was made to the Magistrates who convicted Ackers. The Police Magistrate did, however, request by telephone the Magistrates who heard the case to act, and it may be inferred from the summons and what took place that he so desired them to act. Nor does it appear that the Magistrate was ill or absent, unless that be implied from the fact that it does not appear that he took part in the trial and the conviction of the accused.

The first conviction drawn up did not give the name of the accused, shewing who was convicted of the offence. The second corrected this error, and adjudged that "the said James Ackers for his said offence forfeit and pay the sum of \$100, to be paid and applied according to law, and also pay to the said Hugh Walker the sum of \$7.90 for his costs in this behalf, and, if the said several sums are not paid forthwith, then we adjudge the said James Ackers to be imprisoned in the common gaol for the southern part of the county of Hastings, in Belleville, in the said county, and there to be kept for the space of three months, unless the said sums and the costs and charges of conveying the said James Ackers to the said common gaol shall be sooner paid."

These costs are not mentioned in the conviction, but are mentioned in the warrant of commitment. It would appear that the first form of conviction drawn up and signed by the Magistrates, called an order for the payment of money, and in default of payment imprisonment, stated the fact that the complaint was made before the Police Magistrate in and for the city of Belleville and the southern part of the county of Hastings. This reference to the Police Magistrate is not made in the other amended convictions which were drawn up. It nowhere appears upon the face of the proceedings that the Magistrates acted at the request of the Police Magistrate or in his absence or owing to his illness.

In *The Queen v. Lyons*, 2 Can. Crim. Cas. 218, it was held that a Justice of the Peace, acting in the illness or absence or at the request of a Police Magistrate, should be designated as so acting in warrants or other process, otherwise the latter will be invalid.

In *Rex v. Duerling*, 2 O.L.R. 593, it was held by a Divisional

Court that the conviction was bad because it did not appear that the convicting Magistrate was acting for and at the request of the Police Magistrate.

In *The Queen v. Inhabitants of the Parish of St. George's Bloomsbury*, 4 E. & B. 520, it was held: "Where Justices who have a limited jurisdiction do an act, they must shew, on the face of the instrument, that they have jurisdiction in the particular case. It would not do to leave such a matter to be proved afterwards by parol evidence. Where you do refer to other documents, you do so only because they are connected with the instrument itself which is in evidence; even if Justices came and swore that they did the act in question within their jurisdiction, this would not be sufficient."

Paley on Summary Convictions, 8th ed., p. 32, says: "As jurisdiction must always appear upon the face of summary proceedings, a conviction for an offence committed on the high seas, where *primâ facie* Justices have no jurisdiction, must shew the special facts which give it." See also *In re Peerless*, 1 Q.B. 143, and *The Queen v. McKenzie* (1890), 23 N.S.R. 6.

I do not think the second and third objections are well taken.

As to the fourth ground, it does appear from the information that Hugh Walker is a license inspector, and the amended conviction declares that the fine imposed shall be paid and applied according to law. This, I think, is quite sufficient.

It is true that the warrant does not conform to the conviction, because the conviction does not state the costs and charges of conveying the prisoner to the common gaol. But this, I think, is no ground of objection. The amount for conveying him to the common gaol is stated in the commitment, which is, I think, sufficient.

The last point mentioned in the notice of motion was not argued except as covered by the other points.

Although the conviction, as it stands, cannot, I think, be supported, for the reason that it does not disclose upon its face, what was undoubtedly the fact, that the Magistrates were acting at the request of the Police Magistrate, yet the prisoner ought not to be discharged, but to be detained under the commitment, and the conviction amended under the Liquor License Act, sec. 105 (as enacted by 6 Edw. VII. ch. 47, sec. 30), which, I think, was

D. C.

1910

KEX

v.

ACKERS.

Clute, J.

D. O.  
1910  
REX  
v.  
ACKERS.  
Clute, J.

passed to cover a case of this kind. It provides, sub-sec. 1: "No conviction or warrant enforcing the same or other process or proceeding under this Act shall be held insufficient or invalid by reason of any variance between the information or conviction, or by reason of any other defect in form or substance, provided it can be understood from such conviction, warrant, process or proceeding that the same was made for an offence against some provision of this Act, within the jurisdiction of the Justice or Justices who made or signed the same, and provided there is evidence to prove such offence, and no greater penalty or punishment is imposed than is authorised by this Act." Sub-section 2 provides: "Upon any application to quash such conviction, or warrant enforcing the same, or other process or proceeding whether in appeal or upon *habeas corpus*, or by way of *certiorari* or otherwise, the Court or Judge to which such appeal is made or to which such application has been made upon *habeas corpus* or by way of *certiorari* or otherwise, shall dispose of such appeal or application upon the merits, notwithstanding any such variance or defect as aforesaid, and in all cases where it appears that the merits have been tried, and that the conviction, warrant, process or proceeding is sufficient and valid under this section or otherwise, such conviction, warrant, process or proceeding shall be affirmed or shall not be quashed (as the case may be), and such Court or Judge may, in any case, amend the same if necessary, and any conviction, warrant, process or proceeding so affirmed or affirmed and amended, shall be enforced in the same manner as convictions affirmed on appeal, and the costs thereof shall be recoverable as if originally awarded."

In my opinion, the proper order to be made is that this Court directs that the prisoner be further detained under the present proceedings, and that the Magistrates before whom he was convicted do amend the conviction that it may shew upon its face that the magistrates acted at the request of the Police Magistrate.



## [IN THE COURT OF APPEAL]

REX v. YORKCMA.

C. A.

1910

May 12.

*Criminal Law—Abduction of Young Girl—Criminal Code, sec. 315—Conviction  
—Evidence—Leave to Appeal.*

An application by the prisoner for leave to appeal from a conviction for unlawfully taking an unmarried girl under the age of sixteen out of the possession and against the will of her mother, then having the lawful care and charge of her, contrary to sec. 315 of the Criminal Code, was refused, there being evidence to sustain the conviction, and the object or intention with which the girl was taken being immaterial.

MOTION on behalf of the prisoner for leave to appeal from a conviction.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

The prisoner, upon his election and consent, was tried without a jury by the Judge of the County Court of the County of Ontario and convicted of the offence of unlawfully taking an unmarried girl out of the possession and against the will of her mother, then having the lawful care and charge of her, she being under the age of sixteen years, contrary to sec. 315 of the Criminal Code. And this is an application on his behalf for leave to appeal from the conviction, on the ground that it was against the evidence and the weight of evidence, and for an order requiring the learned Judge to state a case for the opinion of the Court as to whether the evidence disclosed that the prisoner committed the offence or substantiated the charge, or that the girl's action was her own individual act, not induced by persuasion or coercion on the part of the prisoner.

April 25. The motion was heard by Moss, C.J.O., GARROW, MEREDITH, and MAGEE, JJ.A.

W. A. Henderson, for the prisoner, argued that the evidence did not disclose any offence under sec. 315 of the Code, as it did not prove that the prisoner had used persuasion with the girl. He cited *Rex v. Jarvis* (1903), 20 Cox C.C. 249, 251; *The Queen v. Blythe* (1895), 1 Can. Crim. Cas. 263, 282.

J. R. Cartwright, K.C., for the Crown, contended that the evidence disclosed a clear case. *Rex v. Jarvis* was rather in favour of the Crown, as there the girl followed the man away and the case had to go to the jury.

C. A.  
1910  
—  
REX  
v.  
YORKCMA.  
—  
MOSS, C.J.O.

May 12. Moss, C.J.O. (after setting out the facts as above):—  
I am of opinion that this is not a case in which we should grant  
leave to appeal or direct a case to be stated.

The real question is, whether there was evidence upon which  
the learned Judge could properly find, as he did, against the prisoner;  
and of that, I think, there can be no doubt.

The girl's mother was dissatisfied with the relations which had  
sprung up between the prisoner and her daughter, and was strongly  
opposed to their continuance, and of this the prisoner was aware.  
He appears to have left Oshawa, where the girl resided with her  
mother, but was shewn to have returned and been in the town once  
or twice in the interval between his first leaving and the day when  
the girl left her mother's house and joined him at Toronto. There  
is evidence leading to the inference that communications by letter  
and post-card passed between them. He had taken a room in a  
boarding-house in Toronto, stating that it was for himself and  
wife, and, when the girl joined him, he took her there, occupied the  
room with her, and presented her to the proprietor as his wife.  
It is true that the girl, in her evidence, did what she could to shield  
him, and endeavoured to take all the blame to herself; but it was  
for the learned Judge to attach to her testimony such weight as he  
considered proper, having regard to the other evidence in the case,  
and having regard also to sub-sec. 2 of sec. 315 of the Code.

As regards the prisoner's own intentions in the matter, it is to  
be borne in mind that—as pointed out by Osler, J.A., in *Rex v.*  
*Holmes* (1909), 14 O.W.R. 419, at p. 421—under this section the  
object or intention with which the girl was taken, be it innocent or  
wicked, is unimportant. No question of the *mens rea* can arise,  
for the statute is prohibitive, and any one dealing with an un-  
married girl under sixteen does so at his peril.

The application must be refused.

GARROW, J.A.:—I agree.

MEREDITH, J.A.:—This case was one for a jury, if it had been  
tried with a jury. The only substantial question in it is but one  
of fact: there was some evidence—pretty strong evidence, I think—  
of an unlawful taking of the girl out of the possession, and against  
the will, of her mother.

In Oshawa the man endeavoured to induce the girl to go with

him; and there is some evidence that that was frustrated then only by the action of the mother, who was warned as to the man's intentions towards her daughter. There is no evidence that these intentions ceased when he came to Toronto; there is, on the contrary, some strong evidence, against him, in the facts that he at once, on arriving in Toronto, took a room in a boarding-house for himself and wife; and that, when the girl came to Toronto, he at once took her there, where they lived together, as if man and wife, for several days.

The girl's evidence may be equivocal upon the question of the man's influence; but, even if it had been plainly in his favour, the jury might discredit her, and, upon the other facts proved, have found him guilty: see *E. v. F.* (1905-6), 10 O.L.R. 489, 11 O.L.R. 582.

The Code expressly provides that "it is immaterial whether the girl is taken with her own consent or at her own suggestion or not."

In my opinion, the learned County Court Judge was right in refusing to reserve a case, and so this application should be refused.

MAGEE, J.A.:—I agree that this is not a case calling for leave to appeal.

There was not direct evidence of immediate and direct persuasion by the prisoner to the girl to leave her home at the particular time she did, though the inference is strong in view of his engaging the room in Toronto for both. But in that respect the remarks of Bramwell, B., in *Regina v. Olfier* (1866), 10 Cox C.C. 402, directly apply, and I think properly: "Although she may not leave at the appointed time, and although he may not wish that she should have left at the particular time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment he is also guilty, if his persuasion operated on her mind so as to induce her to leave."

So far as appears, if the girl had not met the prisoner in Toronto, she would have returned home; and the remarks of Jervis, C.J., in *Regina v. Manktelow* (1853), as reported in 22 L.J.M.C. 115 (also reported in 6 Cox C.C. 143 and Dears. C.C. 159), are apposite: "If she had not met him she would have returned home. The possession of the father, therefore, was only conditionally renounced. By the act of taking, the prisoner severed the connection between

C. A.  
1910  
—  
Rex  
v.  
YORKMA.  
—  
Meredith, J.A.

C. A.  
 1910  
 REX  
 v.  
 YORKCMA.  
 —  
 Magee, J.A.

the girl and her father, and so took her out of his possession." In *The Queen v. Blythe*, 1 Can. Crim. Cas. 263, cited for the prisoner, where the Court considered that the acts of persuasion, while the girl was with her father across the border in the United States, could not be availed of by the Crown, and the case was dealt with only on what took place in Victoria, B.C., the majority of the Court, who decided in the prisoner's favour, point out that after meeting her there the prisoner used no persuasion or inducement in Canada.

C. A.  
 1910  
 May 12.

[IN THE COURT OF APPEAL.]

REX V. FRANK.

*Criminal Law—Evidence—Accomplice—Corroboration—Jury.*

An accomplice is a competent witness, and a conviction may be had on his uncorroborated evidence, if credit be given to it.

Where the trial is by jury, the Court should call the attention of the jury to the character of the witness as an accomplice and the reasons why care should be taken in accepting the wholly unsupported evidence of such a witness; but the Court has no power to require the jury to reject such evidence.

In this case there was no jury, and it was *held*, that the trial Judge, who was familiar with the common objections to the evidence of accomplices, had power to convict the accused upon the uncorroborated evidence of an accomplice.

*Regina v. Beckwith* (1859), 8 C.P. 274, *In re Meunier*, [1894] 2 Q.B. 415, *The King v. Tate*, [1908] 2 K.B. 680, and *The King v. Warren* (1909), 2 Cr. App. R. 194, 25 Times L.R. 633, discussed.

CASE reserved and stated under secs. 1014 and 1015 of the Criminal Code by the Junior Judge of the County Court of the County of Wentworth.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

The accused was tried before the Junior Judge, at a sittings of the County Judge's Criminal Court, on the charge of unlawfully conspiring with one Morden to defraud the Hamilton Steel and Iron Company by falsely increasing the weight of scrap iron sold by the accused to the company.

The case states that the principal evidence against the accused was given by Morden; that the learned Judge believed his evidence, and was of opinion that it was sufficient to convict without corroboration.



A perusal of Morden's evidence, which with the other evidence is made part of the case, leaves little question as to the sufficiency of his testimony to prove the offence, if given by a witness as to whom no question of corroboration could be raised.

It further appears from the stated case that the learned Judge was of opinion that Morden's evidence was corroborated in material particulars, and there is some evidence in support of this view.

Two questions are submitted by the learned Judge:—

1. Had I the power to convict the prisoner on the evidence of an accomplice alone?
2. If not, was there sufficient corroborative evidence?

April 26. The case was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*E. E. A. DuVernet*, K.C., for the prisoner, argued that, according to the recent practice of the Court, no conviction can be had on the uncorroborated evidence of an accomplice. He cited *The King v. Warren* (1909), 2 Cr. App. R. 194, 25 Times L.R. 633; *Wills on Circumstantial Evidence*, 5th ed., p. 365; *Roscoe's Crim. Evid.*, 13th ed., p. 110; *Russell on Crimes and Misdemeanours*, 7th ed., vol. 2, pp. 2286, 2287; *Taylor on Evidence*, 9th ed., vol. 2, pp. 632, 633; *Phipson on Evidence*, 4th ed., p. 470; *Wigmore on Evidence*, Canadian ed., sec. 2056; *The King v. Tate*, [1908] 2 K.B. 680, 21 Cox C.C. 693; *Regina v. McBride* (1895), 26 O.R. 639, at p. 640; *Tremeeear's Canada Crim. Law and Crim. Evidence*, 2nd ed., sec. 1014.

*J. R. Cartwright*, K.C., for the Crown, contended that there was no law which said that the evidence of an accomplice must be corroborated in order to secure a conviction; nor should the case be withdrawn from the jury for want of corroborative evidence. A conviction on the uncorroborated evidence of an accomplice was legal, though it was the practice for the Judge to caution the jury as to the weight to be attached to the evidence. But that was a question of practice, not of law. In any event, there was here corroborative evidence. He referred to *In re Meunier*, [1894] 2 Q.B. 415; *Taylor on Evidence*, 10th ed., p. 967; *Russell on Crimes and Misdemeanours*, 7th ed., vol. 1, p. 286; *Regina v. Beckwith* (1859), 8 C.P. 274; *Regina v. Fellowes* (1859), 19 U.C.R. 48; *Regina v. Andrews* (1886), 12 O.R. 184, at p. 191; *The King v. Tate*, *supra*.

*DuVernet*, in reply.

C. A.  
1910  
REX  
v.  
FRANK.

C. A.  
1910  
REX  
v.  
FRANK.  
—  
MOSS, C.J.O.

May 12. Moss, C.J.O. (after setting out the facts as above):—  
It was argued on behalf of the accused that, according to modern views, no conviction can be had on the uncorroborated evidence of an accomplice. But that does not appear to be the rule of law. An accomplice is a competent witness, and there is no rule nor any statute which says that his evidence must be corroborated. The consequence is inevitable that, if credit be given to his evidence, it may be sufficient of itself to convict the accused. And certainly the case is not to be withdrawn from the jury because there is no corroboration.

In the case *In re Meunier*, [1894] 2 Q.B. 415, the rule was stated by Cave, J., as follows (p. 418): "It is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence; for the evidence must be laid before the jury in each case. No doubt, it is the practice to warn the jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated; but I know of no power to withdraw the case from the jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground."

This statement of the law was approved of by the Court of Criminal Appeal in *The King v. Tate*, reported in [1908] 2 K.B. 680 and 21 Cox C.C. 693. In the former report Lord Alverstone, C.J., is reported as saying (p. 681): "I agree . . . that there is no definite rule of law that a prisoner cannot be convicted on the uncorroborated evidence of an accomplice, and probably Cave, J., did not state the law too strongly . . . in *In re Meunier*." The only qualification the Lord Chief Justice made was that, after quoting the above passage from *In re Meunier*, he proceeded to state as follows: "But I think he ought to have added, 'assuming that the jury was cautioned in accordance with the ordinary practice.' In my opinion it is of the highest importance that the jury should be so directed." And in support of that view he read extracts from Taylor on Evidence, 10th ed., p. 680, and Russell on Crimes, 6th ed., vol. 3, p. 646. From the report in 21 Cox C.C. it may be gathered that the nature of the crime charged, coupled with dissatisfaction with the evidence of the alleged accomplice and the curt direction of the trial Judge to the jury, materially influenced the decision. But it is far from disaffirming the proposition that a conviction may be made upon the uncorroborated testimony of an accomplice. At the utmost, it only affirms, in stronger

language, perhaps, than previously used, the propriety of the trial Judge cautioning the jury on the point. There is not the least hint of doubt as to the rule that, under proper direction, a jury may find an accused person guilty upon the uncorroborated evidence of an accomplice.

In neither of the reports of the case of *The King v. Warren*, 2 Cr. App. R. 194, 25 Times L.R. 633, does it appear that *The King v. Tate* was cited to the Court. And I have not found in the books anything to shew that in the short time which elapsed between the two decisions there had been such a marked change in the rule of law as to justify the statement of Channell, J., that the rule is now quite clear that the evidence of an accomplice must be corroborated.

In *Regina v. Beckwith*, 8 C.P. 274, the Court, sitting under authority of the statute 20 Vict. ch. 61, was called upon to grant a new trial on the ground of misdirection by the trial Judge in charging the jury that they might convict upon the evidence of the accomplice alone. It was held that the failure of the Judge to caution the jury against convicting without corroboration was not a matter of law but of practice; and the rule was discharged, following *Regina v. Stubbs* (1855), 7 Cox C.C. 48. But in doing so Draper, C.J., said (p. 280): "I think it is to be regretted that there should be an omission to submit his evidence to the jury, coupled with a caution which the practice and authority of the most eminent Judges in England recommend."

In the case at bar there was no jury, and the learned Judge appears to have been alive to the law and practice, and there is no reason to doubt that he properly charged himself when forming his conclusions upon the evidence; and, there being no question of his power, there appears also to be no objection to his practice.

The first question should, therefore, be answered in the affirmative; and, that being so, the second question called for no answer; but, if it did, I should not be inclined to disagree with the learned Judge.

The conviction should be sustained.

MEREDITH, J.A.:—Unless we are prepared to upset the law and the practice which has always hitherto existed in this Province, in respect of the evidence of accomplices, this conviction cannot be interfered with.

C. A.

1910

REX

v.

FRANK.

MOSS, C.J.O.

C. A.

1910

REX

v.

FRANK.

Meredith, J.A.

That an accomplice is a competent witness no one yet has doubted or contested. Being a competent witness, and no corroborative evidence being required in the trial of the crime charged, upon what principle can it be held that corroboration is necessary as a matter of law? Common prudence may demand it, as a matter of fact, in most cases, because of the character of the one witness and of the motives which may actuate him in giving false evidence. But that is within the province of the jury exclusively.

It is the right, and indeed the duty, of the trial Court, not only to instruct the jury as to the law bearing upon the case being tried, but also to aid them in regard to matters of fact by calling their attention to such things as may the better enable them to perform their whole duties; and so it is quite within the power, and indeed the duty, of the Court to call to the attention of the jury the character of the witness as an accomplice and the reasons why care should be taken in accepting the wholly unsupported testimony of such a witness: but it has no power to require the jury to reject such evidence, any more than power to require a jury to reject any other competent evidence, and to determine the question of fact itself; that would be a distinct invasion of the province of the jury.

The only reason, or indeed excuse, for the raising of such a case as this, here, is found in the observations attributed to Channell, J., (*The King v. Warren*, 2 Cr. App. R. 194) in delivering the judgment of a Court of Appeal in Criminal Cases in England—observations which, if made as they are presented to us, may have been based upon the powers in regard to matters of fact conferred upon such Courts by the Imperial enactment constituting them, powers which this Court has not; otherwise I have no doubt that they would be contrary to the long-settled law and practice of this Province, in so far as they support the contention that a conviction upon the evidence of an accomplice alone cannot be supported.

No question as to nondirection arises, because the case was not tried by jury, but by the Judge himself, and he was quite familiar with the common objections to the evidence of accomplices, and the warnings usually given to jurors respecting such evidence.

In the case of *The King v. Ah Jim* (1905), 10 Can. Crim. Cas. 126, the Judge was a Judge of fact as well as of law.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.



## [IN THE COURT OF APPEAL.]

## O'REILLY v. O'REILLY.

*Husband and Wife—Ante-nuptial Contract—Sum Payable to Wife at Death of Husband—Onerous Contract—Law of Province of Quebec—Proof of—Evidence of Advocates—Conflict—Examination by Court of Authorities—Finding on Disputed Question.*

The plaintiff, being about to be married to a man resident and domiciled in the Province of Quebec, in 1889, in that Province, entered into a marriage contract with him, whereby, "in the future view of the said intended marriage, he . . . for and in consideration of the love and affection and esteem which he hath for and beareth to the" plaintiff, "hath given, granted, and confirmed, and by these presents doth give, grant, and confirm, unto the" plaintiff, "accepting hereof . . . the sum of \$25,000 . . . payable unto the" plaintiff "by the heirs, executors, administrators, or assigns of him . . . the payment whereof shall become due and demandable after the death of him . . ." In the contract the plaintiff renounced community, dower, and right of dower, and agreed that she and her husband should each be separated from the other as to property. The marriage took place. The husband was at that time insolvent, but the plaintiff was not aware of it. The husband died in 1907, leaving an estate, but not sufficient to pay all his creditors in full, if the plaintiff was entitled to rank as a creditor of the estate for the \$25,000 mentioned in the contract:—

*Held*, that the question of the right of the widow to rank must be determined by the law of Quebec; what that law is falls to be determined upon the testimony of persons skilled in it, but, where their evidence is conflicting and for that reason unsatisfactory to the determining tribunal, it may examine for itself the decisions of the foreign Courts and the statements of the text writers in order to arrive at a conclusion upon the question of the foreign law.

And *held*, upon the evidence and examination of the provisions of the Civil Code of Quebec and authorities cited, that the contract was an onerous one, and not gratuitous, and the plaintiff was entitled to rank as a creditor; MEREDITH, J.A., dissenting.

Judgments of BRITTON, J., and a Divisional Court, affirmed.

By an order made by ANGLIN, J., dated the 18th April, 1908, the following issues were directed to be tried:—

1. The plaintiff affirms and the defendants deny that a certain marriage contract made between Edward O'Reilly and the plaintiff entitles the plaintiff to rank as a creditor of the estate of Edward O'Reilly, deceased.

2. The plaintiff further affirms and the defendants deny that the plaintiff is entitled to the proceeds of a policy of insurance in the Canada Life Assurance Company upon the life of the said Edward O'Reilly, deceased.

June 17, 1908. These issues were tried before BRITTON, J., at the non-jury sittings at Ottawa.

1908

Sept. 28.

D. C.

1909

April 19.

C. A.

1910

May 12.

1908

O'REILLY

v.

O'REILLY.

*F. H. Chrysler*, K.C., and *J. Christie*, K.C., for the plaintiff.

*G. F. Henderson*, K.C., for the defendants *J. M. Garland Son and Company*, on behalf of themselves and all other creditors of *Edward O'Reilly*, deceased.

*M. J. Gorman*, K.C., for the defendants *Joseph O'Reilly* and *William O'Reilly*, executors of the will of *Edward O'Reilly*, deceased.

September 28, 1908. BRITTON, J.:—The plaintiff, whose name was *Eliza Petrie*, resided in *Ottawa*. The deceased *Edward O'Reilly* resided at *Aylmer*, in the Province of *Quebec*. They became engaged to be married, and on the 22nd June, 1889, prior to the marriage, they appeared before a notary for the Province of *Quebec*, at *Aylmer*, and entered into a marriage contract. By this contract it was expressly stipulated that no community of property should at any time thereafter exist between them, notwithstanding the common law of the Province of *Quebec*, and that each of them should be separated from the other as to property, *séparés de biens*, to all intents and purposes.

Then, after the usual provisions in such a contract as to separate control, etc., the contract proceeded:—

“Fourthly, and in the future view of the said intended marriage, he, the said *Edward O'Reilly*, for and in consideration of the love and affection and esteem which he hath for and beareth to the said *Miss Eliza Petrie*, hath given, granted, and confirmed, and by these presents doth give, grant, and confirm, unto the said *Miss Eliza Petrie*, accepting hereof: 1st. The household furniture now owned by the said *Edward O'Reilly* and that which may hereafter be acquired by him by any title whatsoever, to be the said household furniture held, used, and enjoyed by the said *Eliza Petrie* as her own absolute property forever. 2nd. The sum of \$25,000 currency of *Canada*, payable unto the said *Miss Eliza Petrie* by the heirs, executors, administrators, or assigns of him, the said *Edward O'Reilly*, the payment whereof shall become due and demandable after the death of him, the said *Edward O'Reilly*; and, in the event of the said *Miss Eliza Petrie* departing this life before the said *Edward O'Reilly*, but there being children issue of the said intended marriage at the death of the said *Miss Eliza Petrie*, the said sum of money shall be held in trust by the said *Edward O'Reilly*, or his heirs, etc., for the sole benefit of all

the children issue of the said intended marriage, and shall be paid unto them, share and share alike, as they shall attain the age of majority; it being expressly understood that should she, the said Miss Eliza Petrie, depart this life before him, the said Edward O'Reilly, and should there be no children issue of the said intended marriage at the death of the said Miss Eliza Petrie, then the said gift shall become null and void as if it had not been made; and provided further that the said sum of money (said gift) or any portion thereof shall not be liable for the debts of the said Miss Eliza Petrie, nor in any way liable to seizure therefor.

"And for security of the payment of the above given \$25,000, all the immovable properties of the said Edward O'Reilly shall remain specially mortgaged and hypothecated."

The marriage was duly solemnized on the 26th June, 1889, and the parties lived together as man and wife at Aylmer. Two children were born, the issue of the said marriage. These are Edward Petrie O'Reilly and Carlyle Russell O'Reilly, both now living.

At the time of the marriage, Edward O'Reilly was supposed to be doing a very profitable and successful business, and to be a man of considerable means.

Unhappy differences arose between husband and wife, and they separated.

Edward O'Reilly died on the 30th December, 1907, and left an estate, but not sufficient to pay all his creditors in full, if the plaintiff is entitled to rank as a creditor in the distribution of the assets of his estate.

The effect of this marriage contract and the gift of \$25,000 must be determined by the law of the Province of Quebec. Advocates of that Province, eminent in their profession, were called, but they did not wholly agree, and I was obliged to look at the cases cited by these gentlemen. Having done so, I find the case one of difficulty, and one which naturally will invite the consideration of an appellate Court.

I am of opinion that the marriage contract must be interpreted as a whole, and I find it is a valid contract under sec. 1257 of the Code. In this contract the plaintiff expressly renounced community, and agreed that she and her husband should be separated from each other as to property, to all intents and purposes. In addition, the plaintiff renounced dower and right of dower.

Britton, J.

1908

O'REILLY  
v.  
O'REILLY.

Britton, J.  
1908  
O'REILLY  
v.  
O'REILLY.

It was, in fact, in consideration of the intended marriage and of what the plaintiff renounced, as well as in consideration of love and affection and esteem, that the deceased promised to pay, or that his estate should pay, the \$25,000 at his death. It follows that this contract was an onerous and not a gratuitous contract. The so-called gift must be treated as a debt, and, as it has not been satisfied or released, it must rank with other debts.

The attempt by the plaintiff, at the time of the abandonment by the deceased of his property to his creditors in 1890, to establish this as a debt payable during the lifetime of the deceased failed—properly failed—but the plaintiff is not prejudiced by that attempt.

I am of opinion that the case cited by Mr. Aylen in giving his evidence, and other cases cited by counsel for the plaintiff, support the plaintiff's contention.

If I am right in holding the contract not to be gratuitous, then the argument based upon the insolvency of the deceased falls. There was no evidence of any fraudulent scheme or contrivance on the part of the deceased by which future creditors would not get their pay in full. If the contract is gratuitous, then the argument is that if when the contract was made, the deceased was in fact insolvent, fraud must be presumed, and that it must be presumed in favour of future as well as of creditors existing at the time of the making of the contract. The cases cited, *Bussièrès v. Proulx* (1894-5), 1 Rev. de Jur. 58, 507, *Murphy v. Stewart* (1868), 12 Rev. Leg. O.S. 501, support that argument.

It was contended that in this case the fact of the insolvency of the deceased at the time of making the contract was not established. There was evidence given by one of the witnesses aware of the deceased's circumstances at the time—not very satisfactory, but some evidence—and that, taken with the proof that the deceased was in fact insolvent and abandoned his estate to his creditors in 1890, only a little over a year from the date of the contract, warrants the inference that the deceased was in fact not able to pay all his debts in full on the 22nd June, 1889.

I find as a fact that the marriage contract was registered as required by the law of the Province of Quebec.

No useful purpose will be observed by my referring at length to the cases cited or to the facts upon which these cases were decided.

The first issue should be found in favour of the plaintiff.



[The learned Judge determined the second issue in favour of the defendants, for reasons stated by him.]

The defendants J. M. Garland Son and Company, on behalf of themselves and all other creditors of Edward O'Reilly, deceased, appealed from the judgment of BRITTON, J., upon the first issue.

The plaintiff gave notice of appeal from the judgment upon the second issue, but abandoned it at the hearing.

December 7 and 8, 1908. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., ANGLIN and CLUTE, JJ.

*Henderson*, K.C., for the appellants.

*Chrysler*, K.C., for the plaintiff.

*Gorman*, K.C., for the executors.

April 19, 1909. ANGLIN, J.:—This appeal involves the determination of the right asserted by the widow of the late Edward O'Reilly to rank as a creditor upon his estate in course of administration, in respect of a claim for a sum of \$25,000, which, by marriage settlement, he agreed should be paid to her after his death. An issue directed to determine this, and another question as to an insurance policy, was tried before Britton, J., at Ottawa, and, on the 28th September last he gave judgment in favour of Mrs. O'Reilly, holding her to be entitled to rank as a creditor.

It has been found by the trial Judge to be a proper inference from the evidence that Edward O'Reilly was, at the date of the marriage contract, insolvent. The evidence appears to warrant this inference.

The claim of the contestants and the claims of all other creditors arose after the making of the marriage contract, and none of them have been subrogated to the rights of any creditor whose claim antedates that contract (Que. Civil Code, art. 1039). The estate of Edward O'Reilly is insolvent.

The right of the claimant to rank as a creditor depends upon the validity and the construction and effect of her marriage contract—questions which must be determined according to the law of the Province of Quebec, where the parties were domiciled at the time of the making of the contract, and where the contract was in fact made. Advocates at the Bar of that Province were called as witnesses at the trial to explain and give their opinions upon the provisions of the Quebec law bearing upon these questions.

D. C.

1909

O'REILLY  
v.  
O'REILLY.

D. C.  
1909  
O'REILLY  
v.  
O'REILLY.  
Anglin, J.

I have read and re-read the testimony of these witnesses, and have critically examined every authority to which they refer. The conflict of opinion between them is hopeless upon several points. For the claimant it is maintained that the contract is onerous: for the contesting creditors, that it is gratuitous. For the claimant it is asserted that intent, on the part of Edward O'Reilly, at the time of making the contract, to defraud creditors, has not been established; that intent to defraud on the part of Mrs. O'Reilly has not been shewn; and that the contestants, in order to succeed, must prove such intent on the part of both; for the contestants it is argued that fraudulent intent on the part of Edward O'Reilly is a legitimate inference from the fact of his insolvency at the time of the making of the contract and the character of the contract itself, and that the facts in evidence warrant an inference of fraudulent intent on the part of Mrs. O'Reilly; but that it is unnecessary to prove fraudulent intent on her part, and that, without proof of such actual intent, even on the part of the donor, the contract may be avoided. For the claimant it is argued that such a contract as that in question can be attacked only by a creditor whose claim existed when the contract was made; for the contestants it is contended that a subsequent creditor has status to impugn its validity.

Mr. Aylen, the expert witness for the claimant, in interpreting the provisions of the Code prefers to be guided by judicial construction and application of those provisions where available (p. 45); Mr. Foran, one of the expert witnesses for the contestants, states that "we rely more upon the writings of authors for the purpose of explaining the Code than we do on the decisions of the Courts. Case law was almost unknown to us until the establishment of the Supreme Court in Ottawa . . . The Judges were not bound by decided cases unless they had been decided by a higher Court." Mr. Brooke, the other expert witness called for the contestants, expressed his concurrence in Mr. Foran's views, subject to two or three specific exceptions, none of which relates to this particular point.

Upon all these matters the expert witnesses differ, and it becomes necessary to determine which of the opinions put forward is the better supported by the authorities upon which the several counsel rely: *Hunt v. Trusts and Guarantee Co.* (1905), 10 O.L.R. 147, 148; affirmed 18 O.L.R. 351.

It was rather conceded at bar by counsel for Mrs. O'Reilly that, if the contract under which she claims is gratuitous in character, creditors whose claims have arisen since the contract was made, can successfully oppose her claim. The learned trial Judge was of this opinion. Having regard to art. 1039 of the Code—"No contract or payment can be avoided, by reason of anything contained in this section, at the suit of a subsequent creditor, unless he is subrogated in the rights of an anterior creditor"—unless actual fraudulent intent is admitted or proved, the status of subsequent creditors to contest the right of the beneficiary to rank as a creditor must depend upon the nature of the contract itself, and of the right which it confers.

It becomes necessary carefully to consider the terms of the contract in order to determine whether it should be regarded as onerous or gratuitous—a question which counsel appeared to regard as vital—and to decide upon its true construction and effect.

The contract was drawn up by a notary public, and was executed in his presence on the 22nd June, 1899. It recites that the parties have made the contract "in the view of the marriage which it is intended shall be had and solemnized between them." It provides as follows:—

(1) That no community of property shall exist between the spouses; that each shall be separated from the other as to property; that each may purchase and acquire real or personal property without participation, authority, or control of the other, and may hold the same clear, freed, and discharged from every debt, incumbrance, claim, and demand of any kind proceeding from the act or promises of the other. "Provided, however, that all the property of the said Edward O'Reilly shall be subject to and liable for the payment to the said Miss Eliza Petrie of the sum of \$25,000, as hereinafter stipulated."

(2) The personal property of each spouse shall belong to such spouse.

(3) Edward O'Reilly undertakes to pay all household expenses, and to provide wearing apparel, etc., for his wife and children.

The fourth and fifth clauses read as follows:—

(4) "And in the future view of the said intended marriage, he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said

D. C.

1909

O'REILLY

v.

O'REILLY.

Anglin, J.

D. C.  
1909  
O'REILLY  
v.  
O'REILLY.  
Anglin, J.

Miss Eliza Petrie, hath given, granted, and confirmed, and by these presents doth give, grant, and confirm, unto the said Miss Eliza Petrie, accepting hereof: 1st. The household furniture now owned by the said Edward O'Reilly and that which may hereafter be acquired by him by any title whatsoever, to be the said household furniture held, used, and enjoyed by the said Miss Eliza Petrie as her own absolute property forever. 2nd. The sum of \$25,000, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators, or assigns of him, the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him, the said Edward O'Reilly; and, in the event of the said Miss Eliza Petrie departing this life before the said Edward O'Reilly, but there being children issue of the said intended marriage at the death of the said Miss Eliza Petrie, the said sum of money shall be held in trust by the said Edward O'Reilly, or his heirs, executors, administrators, or assigns, for the sole benefit of all the children issue of the said intended marriage, and shall be paid unto them, share and share alike, as they shall attain the age of majority; it being expressly understood that should she, the said Miss Eliza Petrie, depart this life before him, the said Edward O'Reilly, and should there be no children issue of the said intended marriage at the death of the said Miss Eliza Petrie, then the said gift shall become null and void as if it had not been made; and provided further that the said sum of money (said gift) or any portion thereof shall not be liable for the debts of the said Miss Eliza Petrie, nor in any way liable to seizure therefor.

"And for security of the payment of the above given \$25,000, all the immovable properties of the said Edward O'Reilly shall remain specially mortgaged and hypothecated.

(5) "The said Miss Eliza Petrie hath renounced and by these presents she doth renounce to all dower, whether customary or prefix, and to all right of dower."

These clauses are immediately followed by a formal conclusion of the contract.

It is essential to bear in mind that marriage as a consideration is very differently regarded under the Civil Code of Quebec and under the common law of Ontario. The lawyer trained in the doctrine of English law finds it difficult to regard an ante-nuptial settlement, made in consideration of marriage, as aught else than



a contract for valuable consideration. Under the Quebec law the cases appear to be uniform that a contract made in contemplation or consideration of marriage merely is gratuitous—a contract made for a consideration valid but not valuable.

In *Behan v. Erickson* (1881), 7 Q.L.R. 295, Chief Justice Meredith held that a settlement of household furniture by the prospective husband on the intended wife by marriage contract is not onerous and is liable to be set aside, if the donor, at the time it was made, was and knew himself to be insolvent, without proof of knowledge of his insolvency on the part of the donee. The learned Judge says that all the authorities except Chardon regard such a contract as gratuitous. The Civil Code, art. 1034, declares that “a gratuitous contract is deemed to be made with intent to defraud, if the debtor be insolvent at the time of making it.” Article 1035 of the Civil Code provides that “an onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud.”

In *Turgeon v. Shannon* (1901), Q.R. 20 S.C. 135, it was held that the settlement in a marriage contract by the future husband on his intended wife of furniture and household effects is by gratuitous title and is invalid as against a creditor of the husband who was insolvent at the time of the marriage. *McIntosh v. Reiplinger* (1890), 20 Rev. Leg. O.S. 130, and many other authorities, might be cited for this, which seems to be with civil lawyers almost an elementary proposition.

But it is contended that where the contract is made, not merely in consideration of marriage, but in consideration of an abandonment of dower-rights by the intended wife, such abandonment and the acceptance of the contractual provision in lieu of dower render the contract onerous and not gratuitous. For this proposition the claimant relies upon *Turgeon v. Shannon*, *ubi sup.* Archibald, J., there held that a further provision of the contract, above referred to, by which the husband undertook to provide for payment to his wife after death of an annuity of \$600 a year, “to be taken by her in lieu of all dower,” was onerous in its character, the ground of his decision being that this provision is expressly stated to be in lieu of dower.

It may be noted in passing that in the present instance the provision for payment of \$25,000 to the wife is not expressly made

D. C.

1909

O'REILLY

v.

O'REILLY.

Anglin, J.

D. C.  
1909  
O'REILLY  
v.  
O'REILLY.  
Anglin, J.

in lieu of dower, but is stated to be "for and in consideration of the love and affection and esteem which he (the settlor) hath for and beareth to the said Miss Eliza Petrie."

In *Bussières v. Proulx*, 1 Rev. de Jur. 58, 507, the settlement of \$1,500, notwithstanding that it was in the contract stated to be in lieu of dower, was held to be, by title of donation, gratuitous, and therefore susceptible of being set aside without proof of knowledge of the insolvency of the grantor or fraudulent intent on the part of the donee. A possible distinction between these two cases appears to be that in *Bussières v. Proulx*, of which the head-note seems to be misleading, actual fraudulent intent on the part of the settlor was found by the Court, and the gift, which was payable during his life, rendered him insolvent; whereas in *Turgeon v. Shannon* insolvency at the time of the marriage was found, but not actual fraudulent intent on the part of the settlor. The latter case was disposed of under arts. 1033-4-5 of the Civil Code. As to the gift of furniture, a presumption of fraudulent intent under art. 1034 was made in favour of the plaintiff, a portion of whose claim as a creditor antedated the marriage contract. But fraudulent intent could not be presumed by virtue of art. 1034 so as to invalidate the provision for the annuity expressly made in consideration of the relinquishment of dower, because this was held to make the contract as to this item onerous, and to bring it within art. 1035. In *Bussières v. Proulx*, actual fraudulent intent on the part of the settlor, found by the Court, was held sufficient to invalidate the provision for payment of \$1,500, though expressly made in lieu of dower, and, apparently because of non-registration, as against subsequent as well as anterior creditors.

A release of dower-rights must be a valuable consideration quite as much when given for the assumption of a liability to make payment presently as when given in consideration of a promise of payment after death. If the contract is onerous in the one case, I would regard it as onerous in the other; if gratuitous in the one case, I should deem it gratuitous in the other. *Bussières v. Proulx* (1895), the decision of a Court of Review (Loranger, Davidson, and Doherty, JJ.) affirming Ouimet, J., does not appear to have been cited in *Turgeon v. Shannon* (1901); nor does *Dessaint v. Ladrière* (1890) seem to have been referred to in *Bussières v. Proulx*.

In *Dessaint v. Ladrière* (1890), 16 Q.L.R. 277, it was held by Casault, J., that a stipulation in a marriage contract, whereby the future husband, to replace legal dower renounced by the future wife, gave her an undivided half interest in some real estate and, "in addition, the sum of \$2,000 in money to be taken from his most available property in the event of his death and at once after his death," entitled the wife to rank with other creditors against his estate. This case does not appear to be distinguishable upon the ground indicated by Mr. Foran, who said that it involved merely a question between the widow and the heirs-at-law, and did not affect the rights of the creditors, because it is stated in the report, at the foot of p. 278, that the creditors who had received 50 cents on the dollar from the administrator had undertaken to repay whatever might be necessary (*se sont obligés à rapporter*) if the widow should succeed in her claim. But the question actually dealt with in the judgment seems to be one of construction of the contract, *viz.*, whether it meant that the sum of \$2,000 should be paid to the widow out of the estate of the deceased, after payment of creditors, or whether it meant that she was entitled to claim upon all the property left by him concurrently with his creditors. The validity of the instrument as against creditors upon the latter construction does not appear to have been contested. Neither was there in this case any question as to the solvency of the settlor when the contract was made or any suggestion of fraud.

Mr. Brooke does not commit himself to Mr. Foran's view of the decision in *Dessaint v. Ladrière*.

In these three cases the settlement upon the wife was made expressly in consideration of her relinquishment of dower. It is contended for the claimant that, upon its true construction, the contract here under consideration should be deemed to be made in consideration of the renunciation of dower. Mr. Aylen appears to be strongly of this opinion. Messrs. Foran and Brooke are equally strongly of the view that, for several reasons, which they give, the contract, as to the \$25,000, should not be deemed to be made in consideration of renunciation of dower, and their opinion further is that, even if made in consideration of such a release, it should be regarded as a gratuitous and not an onerous contract.

The rule is, no doubt, well established that the words of a contract should be interpreted with reference to each other, and that in

D. C.

1909

O'REILLY

v.

O'REILLY.

Anglin, J.

D. C.  
1909  
O'REILLY  
v.  
O'REILLY.  
Anglin, J.

construing each clause the provisions of the instrument as a whole must be taken into account. But there are a number of features of the particular clause of this contract which contains the stipulation in regard to the payment of the sum of \$25,000 to Mrs. O'Reilly, which, upon the evidence of Messrs. Foran and Brooke, not disputed on this point by Mr. Aylen, seem quite inconsistent with the view that the relinquishment of dower should, in this case, be regarded as the consideration for this undertaking of the settlor.

It is a well-known maxim in our jurisprudence that that method of construction should prevail which will give effect to every provision of a contract, and that no provision should be rejected unless absolutely inconsistent with the general tenor of the instrument.

For the contestants it is pointed out that, when dealing with the undertaking that \$25,000 shall be paid to the intended wife after the death of her future husband, the contract specifies the consideration for this undertaking in the words, "for and in consideration of the love and affection and esteem which he hath for and beareth to Miss Eliza Petrie." The consideration being so stated, not by an inexperienced person, but by the notary drawing the contract, why should other considerations be imported or presumed? In the clause of the contract dealing with this sum of money, it is spoken of as a "gift," and again as "said gift"—language made use of by a skilled person. Moreover, it is not necessary to look to this promise to find consideration for the renunciation of dower by the intended wife. By an earlier provision of the contract, she is relieved from the provisions of the law relating to community of goods, and is given the right to hold separate estate freed from debts and claims of her husband, and it is stated by the Quebec advocates that it is quite customary in marriage contracts where provisions such as these are made to find renunciation of dower-rights without other consideration.

But perhaps the strongest argument in favour of the view that the undertaking for the payment of \$25,000 must be deemed gratuitous, is found in the concluding provision, that "the said sum of money (said gift) or any portion thereof shall not be liable for the debts of the said Miss Eliza Petrie or in any way liable to seizure therefor." Attached to a gratuitous donation, this is a valid provision, and is effective under sec. 599 of the Code of Procedure, which renders exempt from seizure "sums of money or objects



given or bequeathed upon the condition of their being exempt from seizure." The words, "given or bequeathed" in this provision indicate acquisition by gratuitous title. The uncontradicted testimony of Messrs. Foran and Brooke is that such a condition can be validly annexed only to gifts and donations, and not to property acquired by onerous title. In an onerous contract such a stipulation would be null and void. If, therefore, the contract in question should be regarded as onerous, it would be necessary to reject this provision as inconsistent with the character of the undertaking. As already pointed out, this would be contrary to one of the best known canons of construction in our own system of jurisprudence, and would appear to be equally objectionable under the Quebec system.

Other reasons why this provision should be deemed gratuitous are suggested by Messrs. Foran and Brooke. They assert that during the lifetime of the husband all his property, including any money available to pay this \$25,000, is subject to the claims of his creditors and is alienable by him: *Boissy v. Daignault* (1896), Q.R. 10 S.C. 33; Civil Code, arts. 757, 823. In the event of his insolvency, his wife could not prevent all his property being taken to satisfy his creditors' claims, and this was the position up to the moment of his death. The right of the wife herself to this sum of money is said by these gentlemen to be inalienable during the husband's lifetime. They say that it is a mere expectancy. They further say that, if her right to it was by onerous contract, she would be able to part with it; and they refer to art. 1570 of the Civil Code. They maintain that her inability to make title, should she desire to dispose of her right during the husband's lifetime, is another evidence that the contract is gratuitous.

After giving to this question the best consideration of which I am capable, I have reached the conclusion that, upon the proper construction of this contract, the undertaking as to the sum of \$25,000 should not be regarded as made or given in consideration of the wife's renunciation of dower, but that it should be taken as a gift or donation to the wife made in view of the projected marriage and in consideration of love, affection, and esteem, as stated in the contract, and therefore gratuitous upon the authorities above referred to.

The notary drawing the contract must be taken to have inserted

D. C.

1909

O'REILLY

v.

O'REILLY.

Anglin, J.

D. C.  
 1909  
 O'REILLY  
 v.  
 O'REILLY.  
 Anglin, J.

deliberately the consideration which is actually stated, and his omission to refer to the relinquishment of dower or other benefits to the husband or detriments to the wife, under the contract, as part of the consideration, cannot be assumed to have been accidental. Neither should it be presumed that he used the words "gift" and "said gift" without understanding that they imply a gratuitous donation. He must also be taken to have known that the condition as to non-seizability cannot be annexed to anything except a donation. His insertion of this provision in the contract renders it reasonably certain that his choice of the consideration which he had the parties express was deliberate and designed. The entire clause is framed as one would expect to find it if the intention of the draftsman were to make it clearly and undoubtedly gratuitous, and I find it impossible, without doing violence to what I conceive to be an intention clearly expressed in the contract itself, to regard the provision as to the \$25,000 as onerous. I find nothing in the contract, taken as a whole, inconsistent with this view of the character of the \$25,000 stipulation.

What, then, is the effect of this gratuitous marriage contract by which the future husband assumed a present liability to his intended wife for \$25,000, payable after his death by his heirs, executors, administrators, and assigns? The attempted hypothecation of his entire immovable property as security for the payment is admittedly ineffectual. It is only of importance as an indication, if such were necessary, of the settlor's intent that his assumption of liability should be present, and that his indebtedness to his wife should exist from the passing of the contract—that she should then have the status of a creditor—*debitum in presenti solvendum in futuro*. The Civil Code, in art. 777, not referred to by the witnesses, says, "The gift . . . of a sum of money . . . which the donor promises to pay . . . divests the donor in the sense that he becomes the debtor of the donee." This is the view taken in all the cases cited in which the promise was to pay during the lifetime of the settlor: *Denis v. Kent* (1899), Q.R. 18 S.C. 436; *Morin v. Bédard* (1889), 17 Q.L.R. 30; *Viger v. Kent* (1888), 16 Rev. Leg. O.S. 565; *Fox v. Lamarche* (1906), 13 Rev. Leg. N.S. 67.

But counsel for the contestants and their witnesses maintain that where money settled by marriage contract is payable only after the death of the settlor, the settlement must be regarded as a "con-

tractual institution of heirship," a *donatio mortis causâ* in a marriage contract. The effect of such a contract, they assert, is to postpone the right of the donee to the claims of creditors, just as the rights of heirs and testamentary beneficiaries are postponed, and they refer to DeLorimier, *Bibliothèque du Code Civil*, vol. 6, p. 594, and to Mignault, *Droit Civil Canadien*, vol. 4, p. 203.

De Lorimier, from p. 587 to p. 610, collates authorities bearing upon art. 818 of the Civil Code. That article deals with donations in marriage contracts, (a) of present property, (b) of property which the donor may leave at his death, (c) of both together. When the gift is of property which the donor may leave at his death, it is deemed to be made in contemplation of death, and is a *donatio mortis causâ*, vesting no present property in the donee, lapsing if the donee predeceases the donor, and irrevocable only because contained in a marriage contract. Such donations, whether by universal, general, or particular title, are subject to the rights and claims of persons who are creditors of the donor at his death. The gift is in fact construed and treated as a gift out of the succession or estate left after creditors have been satisfied. The authors and commentators regard "property left after death" as "*biens à venir*," future property, during the lifetime of the decedent. And Mignault, in speaking of a "*donation de biens à venir*," at p. 203, says: "If the donation is by particular title, as when the donor gives to the donee a sum of money to be taken from the property which he shall leave at his death, it cannot injure creditors, for the donee . . . is liable for the debts in case the other property is insufficient."

But where the contract is, not that the donee may take from the property which the donor may have at his death—which does not create a *debitum in præsentî*—but is a present gift of, or an unqualified undertaking to pay, a sum of money, payment merely being postponed until the settlor's death, the donee becomes a creditor at once, and the donation is not deemed to be made "*de biens à venir*," but "*de biens présent*;" it "divests the donor in the sense that he becomes the debtor of the donee" (art. 777, C.C.); and in such a case, says Mignault, at p. 203, "as to future debts the right of exemption (of the donee) is absolute, since it is only creditors anterior to the donation who can demand its annulment on account of fraud."

This last statement is, perhaps, too broad, if meant to cover a

D. C.

1909

O'REILLY

v.

O'REILLY.

Anglin, J.

D. C.  
1909  
O'REILLY  
v.  
O'REILLY.  
Anglin, J.

case in which actual intent to defraud future creditors can be proved; but it is, no doubt, intended to be confined to the cases in which presumptions of fraud are raised by the Code: arts. 1034 and 1035. The importance of the passage quoted is, that it shews that donations of this class, though payable at death, are not by the very nature of the gift postponed to the claims of subsequent creditors of the donor, unsatisfied at the time of his death. When there is a gift of a sum of money which the donor promises to pay, he becomes the debtor of the donee under art. 777 of the Civil Code, and he remains such until the debt is discharged, whether it be in his lifetime or after his decease. The donee has the right to rank upon his estate as a creditor equally in the event of its distribution amongst creditors during his lifetime, or, in the event of its administration after his death.

Therefore, apart from the question of fraud, the contract would appear to give Mrs. O'Reilly the right to rank for her claim with other creditors of her deceased husband.

As already pointed out, there being no creditors of the estate of Edward O'Reilly, deceased, whose claims are anterior to the making of the marriage contract, there can be no presumption of fraud under the provisions of arts. 1034, 1035, of the Civil Code. (See art. 1039.) To succeed, therefore, the contesting creditors must prove actual fraudulent intent.

Notwithstanding the insolvency of the settlor when he married, and the comparatively large amount of the gift to his wife, I cannot find in these circumstances enough to warrant an inference that there was actual fraudulent intent in the making of the contract—actual intent thereby to defeat or prejudice future creditors of the settlor.

The argument for the contestants may perhaps be most plausibly presented in this form:—

If the legal effect of this gratuitous provision in favour of the wife were to give priority over the heirs-at-law and other gratuitous beneficiaries in the administration of her husband's estate, but not to enable her to rank with creditors of her husband, there could, of course, be no fraud upon his creditors. But, since the legal effect of the contract, notwithstanding its gratuitous character, is that, if valid, it gives the wife the right to rank with creditors, that fact is important in determining the intent of the parties. It could



only be material to give the wife this right in the event of the husband's estate being insufficient to meet her claim and the claims of his creditors in full. If the estate should prove adequate to meet both, it would not matter whether she was paid *pari passu* with creditors or after their claims had been satisfied; but, if the estate should be insufficient to meet the claims of creditors, then every cent to be paid to the widow would diminish the fund which would be otherwise available to satisfy creditors. The only purpose of the contracting parties in attempting to give to the wife the status of a creditor would be to enable her to take a portion of the fund to which creditors must resort, and this would almost necessarily involve the conclusion that the parties were providing for the case of the husband's estate being insolvent, and therefore contemplated defeating his creditors in part. Having regard to the insolvent condition of the settlor when the contract was made, and to the large amount of the *post obit* provision for the wife, the contract, if intended to give the wife the status of a creditor, was made with fraudulent intent by both parties. If fraudulent intent of both parties is the proper and legitimate inference from the evidence, then the contract would be voidable, not only as against anterior, but also as against subsequent, creditors. The decisions of the Quebec Courts are apparently uniform on this point: *Murphy v. Stewart*, 12 Rev. Leg. O.S. 501; *Ivers v. Lemieux* (1878), 5 Q.L.R. 128; and *Bussières v. Proulx*, *ubi supra*.

But, however logical this argument may appear, it is difficult to conceive that these contracting parties had in mind the idea that the prospective husband might die insolvent, or might leave an estate insufficient to satisfy his creditors and also this claim of his intended wife, and therefore schemed to defeat claims of such future creditors of the husband by this contract. Such an inference would not, in my view, be warranted by the facts in evidence. There is no evidence whatever that the intended wife knew of her future husband's insolvent condition.

I think the contestants fail because actual fraudulent intent has not been shewn, and because, upon its proper construction, the contract, though gratuitous, on the marriage being solemnized, constituted the wife a creditor of the husband, whose right to payment only was deferred until after the husband's death.

The appeal should, therefore, be dismissed with costs.

D. C.  
1909  
O'REILLY  
v.  
O'REILLY.  
Anglin, J.

C. A.

1910

O'REILLY

v.

O'REILLY.

MULOCK, C.J., concurred.

CLUTE, J., agreed in the result.

The defendants J. M. Garland Son and Company appealed to the Court of Appeal from the order of the Divisional Court.

January 19, 1910. The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

*Henderson*, K.C., for the appellants. The plaintiff is not entitled to rank as a creditor upon the estate of her late husband, unless postponed to the claims of creditors generally. The gift of \$25,000 contained in the marriage contract was a gratuitous gift. The gift was in contemplation of death, and not a gift *inter vivos*. And, therefore, the judgment of the Divisional Court is wrong in applying the provisions of art. 777 of the Civil Code, which article applies exclusively to gifts *inter vivos*. See *Page v. Beauchamp* (1901), Q.R. 20 S.C. 220; *Proulx v. Klineberg* (1906), Q.R. 30 S.C. 1. From these cases it is clear that art. 777 of the Code applies only to present gifts of present existing property owned by the donor. The gift in the present case constituted a contractual institution of heirship, or a *donatio mortis causâ* in the marriage contract, in which case it is clear that the right of the donee is postponed to the claims of creditors, just as the rights of heirs and testamentary beneficiaries are postponed: *De Lorimier*, *Bibliothèque du Code Civil*, vol. 6, p. 594; *Mignault*, *Droit Civil Canadien*, vol. 4, p. 203. As foreign law must be proved as a fact, the Court has no right to go beyond the evidence, and the Divisional Court had no right to look at art. 777, which was not proved, or even referred to by any of the witnesses or in any of the cases or authorities cited: *Concha v. Murrieta* (1889), 40 Ch.D. 543; *The Sussex Peerage* (1844), 11 Cl. & F. 85, at p. 114. The second branch of the appellants' position is that the judgment appealed from does not properly appreciate the effect of the insolvency of O'Reilly at the time the marriage was entered into. O'Reilly was insolvent when the contract was made, and the gift to the claimant was gratuitous. From these facts fraudulent intent may be presumed, without the necessity of proving actual intent. The making of such a contract, which rendered the husband insolvent, gives rise to the presumption of an intent to defraud, and that intent must be presumed in favour

of subsequent creditors, without any distinction in that respect between them and existing creditors. It is not at all necessary to shew bad faith on the part of Mrs. O'Reilly: *Behan v. Erickson*, 7 Q.L.R. 295; *McIntosh v. Reiplinger*, 20 Rev. Leg. O.S. 130; *Treacey v. Liggett* (1882), 20 Rev. Leg. O.S. 131 n. On the point that such a contract as this can be avoided at the suit of subsequent creditors, see Mignault, vol. 5, p. 302; *Murphy v. Stewart*, 12 Rev. Leg. O.S. 501; *Ivers v. Lemieux*, 5 Q.L.R. 128; *In re Hughes and Caverhill* (1898), Q.R. 15 S.C. 225, at pp. 226, 227, 229. On the whole, I submit that this case is completely covered by the decision in *Bussi res v. Proulx*, 1 Rev. de Jur. 58, 507. (Reference was also made to arts. 754, 755, 756, 757, 1032, 1033, 1034, and 1035 of the Civil Code).

*F. H. Chrysler*, K.C., for the plaintiff. The plaintiff is entitled to rank as a creditor against the estate of her deceased husband in the distribution of the assets of his estate. The contract in question was an onerous contract, and not a gratuitous one. It was made, not merely in consideration of marriage, but in consideration of an abandonment of dower-rights, and such abandonment, and the acceptance of the contractual provision in lieu of dower, renders the contract onerous, and not gratuitous: *Turgeon v. Shannon*, Q.R. 20 S.C. 135. Even if the contract was a gratuitous one, it constituted a valid debt, payable upon the death of the deceased out of his estate *pari passu* with the other debts of the estate, and its quality as a gratuitous contract could only give priority to persons who were creditors at or before the time the contract was made: arts. 1034 and 1039 of the Civil Code. The contract here was an unqualified undertaking to pay a sum of money, payment being merely postponed until the settlor's death, and the claimant became a creditor at once; and she is entitled to rank on the estate equally with all subsequent creditors. This is not a contractual institution of heirship—a *donatio mortis caus *—as the appellants contend: *Fox v. Lamarche*, 13 Rev. Leg. N.S. 67; *Morin v. B dard*, 17 Q.L.R. 30; *Denis v. Kent*, Q.R. 18 S.C. 436; *Viger v. Kent*, 16 Rev. Leg. 565; *Dessaint v. Ladri re*, 16 Q.L.R. 277. (Reference also to arts. 754, 757, 758, 777, 817, 819, 822, 825, 1040, 1257, 1260, 1262, 1263, 1264, 1265, and 1431 of the Civil Code.)

*J. E. Jones*, for the executors, submitted their rights to the Court.

C. A.  
1910  
O'REILLY  
v.  
O'REILLY.

C. A. *Henderson*, in reply.

1910

O'REILLY

v.

O'REILLY.

MOSS, C.J.O.

May 12. Moss, C.J.O.:—Upon the best consideration that I have been able to give to this case, I have reached the conclusion that the judgment ought to be affirmed.

I confess to having experienced much difficulty in arriving at a conclusion entirely satisfactory to my own mind.

The solution of the question in issue depends upon a proper appreciation of the law of the Province of Quebec governing it. What that law is falls to be determined upon the testimony of persons skilled in it, but I agree that, where their evidence is conflicting and for that reason unsatisfactory to the determining tribunal, it may examine for itself the decisions of the foreign Courts and the text-writers in order to arrive at a conclusion upon the question of the foreign law.

In this case there is a conflict, not only between the learned advocates from Quebec who testified at the trial, but also between the learned Judges who have been called upon to deal with the question.

In the diversity of opinion, I have not been free from doubt, but upon the whole I am prepared to give my adhesion to the conclusion reached by the learned trial Judge, and affirmed, though upon different grounds and for different reasons, by the Divisional Court. My doubts are not sufficiently strong to lead me to dissent from the result.

And I would therefore affirm the judgment appealed from and dismiss the appeal.

OSLER, J.A.:—I agree in dismissing the appeal.

GARROW, J.A.:—I also agree.

MACLAREN, J.A.:—This is an appeal by creditors of the late Edward O'Reilly, of Ottawa, from a judgment of a Divisional Court affirming the judgment of Britton, J., which maintained the right of the widow to rank with the creditors of her deceased husband for a sum of \$25,000, settled upon her by a Quebec ante-nuptial contract of marriage, the matrimonial domicile of the parties having been in the Province of Quebec.

It having been conceded that the rights of the widow as such creditor depended upon the law of Quebec, advocates of that



Province were produced to prove that law—one for the widow and two for the creditors.

These witnesses based their evidence and opinions upon certain articles of the Civil Code of Quebec, but, as is usual in such cases, they differed widely as to what was the result of the application of these articles to the proved or admitted facts of this case.

The question of the solvency of the deceased at the time of the settlement in question was admitted to be a material point. The trial Judge found the evidence on this point meagre and unsatisfactory; but he came to the conclusion that the deceased was in fact not able to pay his debts in full at that time.

Another very important point was whether the contract in question was onerous or gratuitous. As to this the experts were directly at variance as to the Quebec law on the point, coming to opposite conclusions from the articles of the Code and the jurisprudence on the subject. The trial Judge adopted the opinion of the expert for the plaintiff, and came to the conclusion that the contract was an onerous one, and that the \$25,000 was a debt, the consideration for it being the intended marriage, the renunciation of community of property and of dower by the wife, and that, notwithstanding the insolvency of the husband at the time, she was entitled to rank on his estate with his other creditors.

This judgment was taken by the defendants to a Divisional Court. That Court came to the conclusion that on the expert evidence the contract was not an onerous but a gratuitous one; but that the judgment appealed from could be sustained under the last paragraph of art. 777 of the Civil Code, which was not referred to by any of the witnesses. The clause in question reads as follows: "The gift of an annuity created by the deed of such gift, or of a sum of money or other indeterminate thing which the donor promises to pay or to deliver, divests the donor in the sense that he becomes the debtor of the donee."

On the appeal to this Court counsel for the appellants relied upon the reasoning of the judgment of the Divisional Court upon the expert evidence, and contended very strongly that, as foreign law is a question of fact, the Court has no right to go beyond the evidence, and that the Divisional Court had consequently no right to look at art. 777 of the Code, which was not proved or even referred to by any of the legal witnesses or in any of the cases or authorities

C. A.

1910

O'REILLY

v.

O'REILLY.

Maclaren, J.A.

C. A.  
 1910  
 O'REILLY  
 v.  
 O'REILLY.  
 ———  
 Maclaren, J.A.

cited by them. The counsel for the respondent did not challenge this statement of the law. I consider, however, that we should endeavour to ascertain what is really the law on this very important point, and whether the Divisional Court was in error in looking beyond the articles of the Code and the authorities cited by the expert witnesses.

The leading authority upon the point binding upon us is a Privy Council decision, *Bremer v. Freeman* (1857), 10 Moore P.C. 306. The head-note of that case reads as follows: "Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law; but where the evidence of the experts is unsatisfactory and conflicting, the appellate Court, not having an opportunity of personally examining the witnesses to ascertain the weight due to each of their opinions, will examine for itself the decisions of the foreign Courts and the text-writers, in order to arrive at a satisfactory conclusion upon the question of foreign law." The language of this head-note is not in the precise words of Lord Wensleydale, who pronounced the judgment of the Board, but it correctly represents the course adopted by their Lordships in that case, in which, it may be remarked, the Judicial Committee was not sitting as an appellate Court on a judgment from a colony where foreign law prevailed, but on an appeal from the decision of the Prerogative Court of Canterbury as to a will executed in a foreign country.

In the case of *Concha v. Murrieta*, 40 Ch.D. 543, at p. 550, the Court of Appeal in England expressly approved of the head-note in the *Bremer* case, above quoted, as did a Divisional Court in our own Province in the case of *Rice v. Gunn* (1881), 4 O.R. 579, at p. 589.

But this art. 777 of the Code occupies in this Province a higher position than ordinary foreign law. It appears in the statutes of the late Province of Canada as resolution 133 in the schedule to 29 Vict. ch. 41, which enacted the Civil Code for what was then Lower Canada, and appears as art. 777 of the edition of the Civil Code printed by the Queen's printer of that Province. By our Evidence Act, R.S.O. 1897, ch. 73, sec. 21, a statute so printed and published is receivable in evidence and proves the contents thereof in the Courts of this Province. It was not suggested on behalf of the appellants that this article had been amended or repealed; the technical objection above mentioned was exclusively relied upon.

Of course it was quite competent for the Court which found this enactment in the statutes of the old Province of Canada to have examined the subsequent statutes of that Province and of the Province of Quebec, which alone had the power to amend or repeal the article in question, and see whether the law as there enacted had been changed.

On account of the conflicting nature of the evidence of the expert witnesses and of the authorities cited by them, it would have been more satisfactory if the parties had taken advantage of the provisions of the Imperial statute 22 & 23 Vict. ch. 63 (R.S.O. vol. 3, p. xxviii.), to have the main question of law referred to the Quebec Court of Appeal.

In the circumstances, this Court is at a disadvantage, whether we confine ourselves to the evidence of the experts, as is contended by the appellants, or whether we examine for ourselves the decisions and the text-writers, as was done in the case of *Bremer v. Freeman*. However, in whatever way we decide, it will still be open to the unsuccessful party to carry the case to the Supreme Court or to the Privy Council, which are not subject to the same limitations, but may pass authoritatively upon the law of Quebec as well as of the other Provinces or countries under their respective jurisdictions, without any expert evidence regarding the same.

In the argument before us the claim of the appellants was based upon the following articles of the Civil Code: "1032. Creditors may in their own name impeach the acts of their debtors in fraud of their rights, according to the rules provided in this section.—1033. A contract cannot be avoided unless it is made by the debtor with intent to defraud, and will have the effect of injuring the creditor.—1034. A gratuitous contract is deemed to be made with intent to defraud, if the debtor is insolvent at the time of making it."

The trial Judge found that the husband was insolvent at the time of making the marriage contract, but held that the contract was an onerous one, and that the wife was not aware of his insolvency; and that, in consequence, the appellants failed for not meeting the requirements of art. 1035, which says: "An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud."

The appellants relied upon and invoked the judgment of the Divisional Court in so far as it held the contract to be a gratuitous

C. A.  
1910  
O'REILLY  
v.  
O'REILLY.  
Maclaren, J.A.

C. A.

1910

O'REILLY

v.

O'REILLY.

Maclaren, J.A.

one; but contended that art. 777 had no application, being limited exclusively to gifts *inter vivos* where immediate delivery to the donee was contemplated.

In considering arts. 1032-4 of the Civil Code above cited, regard should be had to the other articles of sec. VI., of which they form part. The section is headed "Of the avoidance of contracts and payments made in fraud of creditors." The action given by the section is known as the Roman *actio Pauliana*. Article 1032 specially provides that the acts of debtors may be impeached by creditors "according to the rules provided in this section." Among these rules are those contained in arts. 1039 and 1040, which read as follows: "1039. No contract or payment can be avoided, by reason of anything contained in this section, at the suit of a subsequent creditor, unless he is subrogated in the rights of an anterior creditor.—1040. No contract or payment can be avoided by reason of anything contained in this section, at the suit of an individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof. If the suit be by assignees or representatives of the creditors collectively, it must be brought within a year from the time of their appointment."

It is admitted in the reasons of appeal and was in the argument before us that the appellants were creditors only subsequent to the contract, and such would have been the presumption, considering the lapse of time (over eighteen years), and that they were commercial creditors of the deceased, a trader. The onus would be on them under art. 1039 to shew that they had the necessary qualifications to have the contract set aside, which they have not done. The limitation or prescription of one year, under art. 1040, would also appear to be fatal to their claim. This is one of the cases in which the exception in art. 2188 of the Civil Code applies when it says: "The Court cannot of its own motion supply the defence resulting from prescription, except in cases where the right of action is denied." *Gagnon v. Dunbar* (1900), Q.R.20 S.C. 515, is an authority exactly in point.

Even if the contract were a gratuitous one, as contended by the appellants, I cannot find in any of the three cases cited by the Divisional Court, *ante* p. 209 *et seq.* (and two of which are referred to by the trial Judge, *ante* p. 204) any authority for maintaining the appellants' present claim, as I think they are all clearly disinguishable.



In *Murphy v. Stewart*, 12 Rev. Leg. O.S. 501, the action was brought before the Civil Code came into force, under the Insolvent Act of 1864, by the assignee, within a year after his appointment. It was there held that the deed of gift from the father and mother to the daughter was simulated, and the decision is specially put upon this ground. In *Ivers v. Lemieux*, 5 Q.L.R. 128, the deed of donation in question was not registered, as required by art. 804 of the Code, so that it was a nullity, and, as provided by art. 806, could be attacked by posterior creditors. It was further held that the deed was passed expressly to defraud the plaintiff, and that, although his claim had not passed into a judgment until after the donation, it had its origin before. The last paragraph of the report (p. 132) shews that this was the ground on which the judgment was based. In the third case, *Bussièrès v. Proulx*, 1 Rev. de Jur. 58 and 507, the marriage contract in question was executed on the 10th October, 1892; but it was not registered, as required by arts. 806 and 807 of the Code, until the 7th December, 1893, and was consequently without effect or validity until that time. It might, therefore, be attacked by posterior creditors, under art. 806, and it was proved that the creditors on whose behalf the contestation was made by the assignee in insolvency within the year were creditors before the contract was registered, and the contestation was maintained on these grounds.

I have examined all the Quebec cases cited by the expert witnesses, and also those in Beauchamp's Annotated Code under these articles, and I have not found a single case in which an attack by subsequent creditors even on a gratuitous contract was maintained except where the deed was a simulated one and consequently null and of no effect, as in *Murphy v. Stewart*, *supra*; *Gendron v. Labranche* (1893), Q.R. 3 S.C. 83; *Lighthall v. O'Brien* (1894), Q.R. 6 S.C. 159; and *In re Hughes and Caverhill*, Q.R. 15 S.C. 225; or else in cases where the deed was null because it was not registered, in which latter case subsequent creditors are specially given the right to have it set aside by arts. 806 and 807, as was done in *Ivers v. Lemieux* and *Bussièrès v. Proulx*, *supra*, and in *Bouchard v. Beaulieu* (1898), Q.R. 14 S.C. 483.

It is to be noted that in art. 803, which also gives the right to attack a gift where the donor is insolvent when it is made, and the

C. A.  
1910  
O'REILLY  
v.  
O'REILLY.  
Maclaren, J.A.

C. A.

1910

O'REILLY

v.

O'REILLY.

Maclaren, J.A.

donee is ignorant of such insolvency, the right is restricted to "previous creditors."

The foregoing observations would all be applicable, and, if well founded, would dispose of the appeal adversely to the appellants under arts. 803, 1039, and 1040 of the Code, even if the contract, as contended by them, were a gratuitous one, without invoking the provisions of art. 777, as was done by the Divisional Court.

But there are provisions in the contract to which, I think, sufficient consideration has not been given in the argument for its being a gratuitous one, and which go to distinguish it from some of the cases which have been relied upon to place it in that category.

It has been assumed throughout by the appellants that the contract was not in any event to have any effect before the death of the donor, and this has been used as an argument to strengthen the theory of one of the expert witnesses that it was a mere contractual institution of heirship. If one looks at the contract (p. 66, line 20) it will be seen that it provides, as to the \$25,000, that if the wife should die before the husband, and there be children, the husband is to hold the \$25,000 in trust for their benefit, to be paid to them equally as they severally attain the age of majority. It might have happened that the wife should die and the children attain majority during the lifetime of their father. The fact that the event did not actually happen cannot alter the character of the instrument, which must be determined by its language and by what was its nature at the time it was executed. The stipulation that this important provision might take effect even conditionally prevents the instrument being considered as either a contractual institution of heirship or a gift in contemplation of the donor's death, and makes it in reality partake of the nature of a transaction *inter vivos*. This point, however, need not now be considered, as it was not urged before us; but the argument that the contract was a gratuitous one exclusively relied upon.

Again, I am of opinion that the instrument should be construed more liberally and less technically than as contended for by the appellants.

Although the \$25,000 is said to be in consideration of love and affection and esteem, yet I do not think we should exclude the remainder of the instrument. It is said to be "in the future view of the intended marriage," and it is preceded by a clause providing

for the exclusion of the community of property, and followed by a renunciation of dower. It appears from the evidence that the husband had at the time valuable real estate to which dower could have attached, so that the renunciation was a valuable and substantial consideration, and I agree with the trial Judge that this may fairly be taken into account and that the instrument should be construed as a whole.

Although the document was drawn by a professional man, I do not think we can attach much weight to the fact that he inserted a clause providing for the \$25,000 being exempt from seizure. In the very next sentence he has inserted a provision purporting to secure the amount by mortgage, which is of no legal effect, and he has also in the earlier part of the instrument inserted provisions about the wife acquiring and dispensing of real property without authorization by her husband, which are also a nullity and of no effect. Nor do I attach much importance to the fact of his having used the word "gift." The instrument itself shews that he was using a language with which he was not critically familiar, and I do not think we can conclude that it was used in an exact or technical sense.

While the French authors who have written on the subject are divided as to whether such a contract as this is gratuitous or onerous, yet, as stated by Dorion, C.J., the French Courts, which were also formerly divided on the subject, have uniformly since 1845 upheld the doctrine of their being onerous. The reports shew that the decisions of the Quebec Courts have not been uniform or consistent. The strongest case in favour of the claim of the appellants is that of *Behan v. Erickson*, 7 Q.L.R. 295. But in that case the report does not state whether or not there was a renunciation of dower, although it must be admitted that this is a very common clause in Quebec contracts. That case, however, is not an authority for the claim of the present appellants, as the report shews that it complied with the provisions of both the articles 1039 and 1040 ; while the present case complies with neither.

I am of opinion that the appellants have not presented such a case as would justify us in reversing the judgments of the two Courts that have decided in favour of the plaintiff.

MEREDITH, J.A.:—It is said that this case is to be determined according to the law of the Province of Quebec, because the contract

C. A.  
1910  
O'REILLY  
v.  
O'REILLY.  
Maclaren, J.A.

C. A.  
1910  
O'REILLY  
v.  
O'REILLY.  
Meredith, J.A.

in question was made there; and, in the facts of this particular case, that may be nearly, though not quite, so. The rule is commonly said to be, that when a contract is made in a foreign country, and in a foreign language, an English Court in construing it must first obtain a translation of the document, then an explanation of any terms of art it may contain, then evidence of the foreign law applicable to it, and then of any peculiar rules of construction existing in that law, and after that must interpret the document on the ordinary principles of construction: see *Di Sora v. Phillipps* (1863), 10 H.L.C. 624; and, it need perhaps hardly be stated that, "all that relates *ad litis ordinationem* is taken from the *lex fori* of that country where the action is brought:" see *Huber v. Steiner* (1835), 2 Scott 304; *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; see also *Kaufman v. Gerson*, [1904] 1 K.B. 591.

It is also said that there is an irreconcilable conflict of testimony upon the question of fact, what the law of Quebec, applicable to the case, is. In that I am quite unable to agree; on the contrary, it seems to me that all of the material testimony, upon that question, is reconcilable and indeed harmonious.

The result of it, so far as of any great importance in the determination of this case, is, that, if there were no consideration, or even no consideration other than that of marriage, for the intended husband's promise to pay the money in question, that promise created a right which was, and is, subordinate to the right of ordinary creditors; but that, if there were the consideration of a renunciation of rights of community of property and of dower, or either, then it created an obligation the same as that of an ordinary debtor.

It is only when the witnesses were improperly asked to determine this case that any conflict arose; upon that subject the witnesses were, as one might expect, hopelessly in conflict.

The single point in dispute is, therefore, not any question of law, but the simple question of fact, was there really any consideration, other than that of marriage, for the obligation which the plaintiff is now seeking to enforce; if not, the action fails; if there were, the plaintiff should succeed, as hitherto she has succeeded.

For the reasons fully pointed out by the witnesses for the defendants, and reiterated at length in the judgment of the Divisional Court and there adopted, it seems to me to be very plain that there was no consideration for this obligation the intended husband took



upon himself; it was, as the parties solemnly and very plainly and explicitly stated, a gift.

In addition to all that, the plaintiff's testimony is distinctly to the same effect. To find the contrary would be to fly in the face of the whole evidence, with no substantial reason, that I can imagine, except that the plaintiff is a woman and the widow.

Apart from the gift of the \$25,000, the document in question was the ordinary, and said to be almost invariable, marriage contract: the parties mutually renouncing the rights which otherwise the law would confer upon them, and choosing rather that each should hold that which he and she had; so that neither the renunciation of dower or of community of property was, quite apart from this gift, without, or indeed without the usual, consideration.

The Divisional Court erred in giving effect to an article of the Civil Code which was not proved, nor indeed even referred to, at the trial, but which is mentioned in some of the cases that were there referred to. That article is now said, by counsel for the defendants, to have no sort of bearing upon a case such as this; whilst counsel for the plaintiff agrees that it is not directly applicable; and altogether it appears to have been really the case of discovery of a "mare's nest" only.

I would allow the appeal and dismiss the action.

I have now had the benefit of reading the judgment of Mr. Justice Maclaren, in which he has reached a conclusion opposed to that expressed in the foregoing words, written by me at the close of the argument of this appeal; and I have, in view of his opinion, reconsidered the case in all the additional light which is thrown upon it by him; but am unable to alter the views previously expressed.

There are three things which seem to me to be very plain: (1) that there is no conflict in the evidence as to the law of Quebec; all the witnesses agree that, if the obligation in question was gratuitous, it is invalid, if onerous, valid: (2) that the question whether onerous or not is one of fact to be found by the Court in which the action is tried; and (3) that, however useful the cases in Quebec, in which that question of fact was dealt with, may be, they have no sort of binding effect; nor would they if they had been decided in this Province. They do not deal with any peculiar rules of construction, but of fact only. Upon that question of fact I cannot come to any other finding than that reached by the Divisional Court, as I have already stated.

C. A.

1910

O'REILLY

v.  
O'REILLY.

Meredith, J.A.

C. A.  
 1910  
 O'REILLY  
 v.  
 O'REILLY.  
 Meredith, J.A.

All questions respecting the law of Quebec are, in the Courts of this Province, questions of fact; and must, I should think, continue such throughout; and, therefore, an unlimited excursion into the Quebec Code, for the discovery of articles not proved or in any manner relied upon or referred to by any of the parties, is quite unauthorised; and, if it were not, after the experience of the Divisional Court in that way, one would be very unwary in seeking for new points, decisive of the action, not before suggested by any party to the action, and which, if so suggested, might have been repudiated by them, as they both virtually do the discovery of art. 777.

But, if the newly discovered articles might be looked at, it might not be difficult to point out their inapplicability to this case: that I abstain from doing, or attempting to do, because I am firmly convinced that they are not in evidence, and so should not be considered.

---

[DIVISIONAL COURT.]

D. C.  
 1910

BROWN V. CITY OF TORONTO.

Mar. 15  
 Mar. 23.  
 May 12.

*Trial—Jury Notice—Action against Municipal Corporation—"Nonrepair"—Ontario Judicature Act, sec. 104.*

In an action against a city corporation to recover damages for injuries sustained by the plaintiff, the allegation in the statement of claim was that "the plaintiff tripped by reason of a hole in the boulevard caused by the negligence of the defendants taking up the old sidewalk and not filling in :"—

*Held*, that, whether the negligence alleged was misfeasance or nonfeasance, the action was "in respect of injuries sustained through nonrepair of streets, roads or sidewalks," within the meaning of sec. 104 of the Ontario Judicature Act, and was, therefore, to be tried by a Judge without a jury.

Discussion of the authorities and the meaning of the word "nonrepair." Order of BOYD, C., reversed, and that of the Master in Chambers, striking out the jury notice, restored.

MOTION by the defendants to set aside a jury notice served by the plaintiffs, on the ground that the action was not one to be tried by a jury: Judicature Act, sec. 104.

By the statement of claim the plaintiffs (husband and wife) asked \$2,000 damages for injuries caused to the wife "by reason of a hole or depression in the boulevard at" (the north-west corner

of Elizabeth and Albert streets) "caused by the negligence of the defendants taking up the old sidewalk and not filling in."

March 12. The motion was heard by the Master in Chambers.

*H. Howitt*, for the defendants.

*S. H. Bradford*, K.C., for the plaintiffs.

March 15. THE MASTER IN CHAMBERS:—Does the negligence charged as above constitute a case of nonrepair? The importance of a correct answer to this question arises from the necessity of giving notice in cases of nonrepair, though it also decides whether the plaintiff can have a trial by jury.

The last reported case in which this point came before me was *Burns v. City of Toronto* (1906), 13 O.L.R. 109. There it was held that the plaintiff's claim was for nonrepair. The result of that case is to be found in 10 O.W.R. 723. And the facts seem to shew that there was more ground there for asserting misfeasance on the part of the defendants than is found here. "Taking up the old sidewalk and not filling in" seem to make a plain case of nonrepair.

The case of *Keech v. Town of Smith's Falls* (1907), 15 O.L.R. 300, at p. 302, was relied on by Mr. Bradford. There, however, the matter came up on appeal to dismiss the action for want of notice. The whole evidence was before the Court. But one of the difficulties in a motion made at this stage is that there is nothing but the statement of claim to go by; and yet this procedure is, no doubt, often adopted (as avowedly in this case) to have the question of the necessity of notice indirectly decided, so as to prevent a plaintiff incurring the expense of an action which has little, if any, chance of success, unless it is a case of misfeasance.

Mr. Bradford cited the judgment of Anglin, J., in *Sangster v. Town of Goderich* (1909), 13 O.W.R. 419, at p. 421, where the neglect of the corporation in a similar action is spoken of as misfeasance. But in that case nothing turned on the distinction between misfeasance and nonfeasance. The trial Judge seems to have proceeded on the latter ground.

The learned counsel also cited *Dickson v. Township of Haldimand* (1903-4), 2 O.W.R. 969, 3 O.W.R. 52. But the facts there are different, as building a dangerous wall is a positive act, whereas "not filling in" is an omission, or, in other words, nonfeasance.

D. C.

1910

BROWN

v.

CITY OF  
TORONTO.

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.  
Master in  
Chambers.

He also cited *Smith v. City of Vancouver* (1897), 5 B.C.R. 491. There, as will be seen from the report, there was clearly a case of misfeasance. Davie, C.J., says (at p. 493) that the stoutly contested case of *City of London v. Goldsmith* (1889), 16 S.C.R. 231, "proceeds upon mere nonfeasance," which in British Columbia gives no right of action.

It was said by Street, J., in *Barber v. Toronto R.W. Co.* (1896), 17 P.R. 293, that "the cases upon nonrepair and obstruction have run into one another a good deal." It may be doubtful if there is any clearly defined rule on the point. Each case must be decided in a great degree on its own facts. Here it does not seem to me that the facts as alleged in the statement of claim are as much in favour of the right to a jury as they were in *Burns v. City of Toronto*, *supra*, which I at least am bound to follow.

If the counsel for the plaintiffs feels sufficiently strongly on the point, he will no doubt carry the matter higher.

As the matter is one of importance and not always easy to decide, the motion will be allowed with costs in the cause.

The plaintiffs appealed from the Master's order.

March 22. The appeal was heard by BOYD, C., in Chambers. The same counsel appeared.

March 23. BOYD, C.:—"The plaintiff tripped by reason of a hole in the boulevard caused by the negligence of the defendants taking up the old sidewalk and not filling in." This is the cause of action stated by the plaintiffs in the second paragraph of their statement of claim, but whether it is based on nonrepair of the sidewalk or on misfeasance in removing an old sidewalk, so as negligently to make a hole, may be argued very persuasively either way, on the bald statement. The learned Master has read it as implying a plain case of nonrepair, and cases may be found to justify this gloss. I incline rather to read it as alleging that the *status quo* was disturbed by the action of the defendants so as to render the place unsafe; and there are cases to sustain this view. This is perhaps one of the cases, as the facts may be developed in evidence, where nonfeasance may be equivalent to misfeasance, as pointed out by the Lord Chancellor in *Mayor, etc., of Shoreditch v. Bull* (1904), 20 Times L.R. 254. The ultimate decision may



be that this case falls within what was held in *Keech v. Town of Smith's Falls*, 15 O.L.R. 300, to be the doing of a lawful act in such a way as to endanger the safety of pedestrians. I do not now say that the decision of the Master is erroneous; but I am averse to decide at the outset that this is a case which must be tried without a jury. Not only the method of trial, but the right to recover at all, by reason of the statutory limit of time for suing being disregarded, is involved in the consideration of the nature of the case, and I prefer to suspend these matters to a later stage, by restoring the jury notice. This is distinctly to be without prejudice to the subsequent prosecution of the case when the stage of trial is reached.

Costs will be in the cause.

March 30. Upon the application of the defendants, leave to appeal to a Divisional Court was granted by FALCONBRIDGE, C.J.K.B.

April 4. The defendants' appeal was heard by a Divisional Court composed of BRITTON, TEETZEL, and RIDDELL, JJ.

*H. Howitt*, for the defendants. This is an action for damages "in respect of injuries sustained through nonrepair of streets, roads or sidewalks," and must be tried by a Judge without a jury under the provisions of sec. 104 of the Judicature Act. The "nonrepair" mentioned in the section is a condition of the street, road, or sidewalk, which may arise either by misfeasance or nonfeasance on the part of the corporation. But, whichever way it came about in this case, it was nonrepair, and the jury notice should be struck out. If this were a case of nonfeasance, then the action could not be maintained, because the provisions of sec. 606 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19 (O.), in regard to giving notice, and bringing the action within a specified time, had not been complied with. If misfeasance, these provisions would not require to be followed. But in either case it was nonrepair, and the jury notice should not be allowed to stand. Reference to *Minns v. Village of Omeme* (1902), 8 O.L.R. 508; *Keech v. Town of Smith's Falls*, 15 O.L.R. 300; *Burns v. City of Toronto*, 13 O.L.R. 109; *Dickson v. Township of Haldimand*, 3 O.W.R. 52; *Borough of Bathurst v. Macpherson* (1879), 4 App. Cas. 256; *Castor v. Township of Uxbridge* (1876), 39 U.C.R. 113.

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.  
Boyd, C.

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.

*S. H. Bradford*, K.C., for the plaintiffs. This is not a case of "nonrepair," but one of misfeasance on the part of the corporation, and therefore sec. 104 does not apply, and the plaintiffs are entitled to a jury trial. Nonrepair is applicable only to a state caused by nonfeasance. As this was not nonfeasance, but misfeasance, the provisions of sec. 606 of the Municipal Act do not apply, and the plaintiffs are not bound to give the notice required by the section. Reference to Biggar's Municipal Manual, p. 837; *Griffin v. Houlder Line Limited* (1904), 20 Times L.R. 255; *McDonald v. Dickenson* (1897), 24 A.R. 31, at p. 42; *Municipality of Pictou v. Geldert*, [1893] A.C. 524, at p. 531; *Rowe v. Corporation of Leeds and Grenville* (1863), 13 C.P. 515; *Sangster v. Town of Goderich*, 13 O.W.R. 419.

May 12. RIDDELL, J. (after setting out the facts):—The appeal has been argued with great ability on both sides.

It will be seen that in both the Courts below the motion has been considered to turn upon the question whether the action is based upon nonfeasance or misfeasance. Were I able to convince myself of the correctness of this, I should have no hesitation in dismissing the appeal, for, even if the statement of claim were held in strictness to allege nonfeasance only, the plaintiffs might amend by alleging misfeasance and have their jury notice reinstated. I considered a question not dissimilar in *Moore v. City of Toronto* (1907), 9 O.W.R. 665.

Counsel for the defendants takes the position that, even though the action is for misfeasance, he is entitled to have the jury notice struck out—and this is the position to be examined.

The section relied upon is sec. 104 of the Ontario Judicature Act: "All actions against municipal corporations for damages in respect of injuries sustained through nonrepair of streets, roads or sidewalks shall be tried by a Judge without a jury. . . ."

There are two kinds of actions which in Ontario can be brought against municipalities in respect of injuries sustained through something wrong (I purposely use the indefinite expression) in their highway. The "something wrong" was caused by: (1) misfeasance occasioning a nuisance in the highway; this was actionable at the common law: *Borough of Bathurst v. Macpherson*, 4 App. Cas. 256; or by (2) nonfeasance, e.g., omitting to keep in

repair or to put into repair after a harmful interference with the highway itself by third persons or a freshet, etc., etc. This, while it might give occasion to an indictment, could not give a cause of action at the common law, but it required a statute to give a right of action to one injured: *Municipality of Pictou v. Geldert*, [1893] A.C. 524.

As early as 1850, by 13 & 14 Vict. ch. 15, sec. 1, the corporations of cities and incorporated towns in Upper Canada were made civilly responsible for all damages sustained by any party by reason of their default in keeping their roads in repair. This in 1858, and in 1859 at the consolidation, was extended; and in the C.S.U.C. ch. 54, sec. 337, appear much the same provisions as in our present sec. 606 of the Municipal Act.

Many cases are to be found in our Courts for damages for accidents upon highways where the highway was not as it should be by reason of each of these causes.

The Legislature from the very beginning hedged about the statutory action by providing that it must be brought within three months—this provision being found in the Act and section giving the right of action. This was the state of affairs when was passed the statute (1896) 59 Vict. ch. 18—"The Law Courts Act, 1896," "An Act to amend the Judicature Act, 1895, and the Law relating to the Superior Courts"—this by sec. 5 provides that "all actions against municipal corporations for damages in respect of injuries sustained through nonrepair of streets, roads or sidewalks, shall hereafter be tried by a Judge without a jury . . . ;" this enactment being now sec. 104 of the Judicature Act.

It is to be observed that the cause of the injury is what is particularised, not the cause of the condition of the street, etc.; the section does not say "actions against municipalities for failing to repair," etc., or "for not repairing," etc., or "because they did not repair," etc., or "in respect of injuries sustained through the failure of the municipalities to repair," or any similar language. Nor is this section an amendment of the Municipal Act, so that it might perhaps be inferred that the provisions of the section should be restrained to cases under the Municipal Act. The Municipal Act is not referred to, as, *e.g.*, in sec. 606 (3), where notice is made obligatory, the notice is required only in cases "under this section." Nowhere is there any intention apparent to restrict the generality

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.  
Riddell, J.

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.  
Riddell, J.

of the provision—and it would seem that in every case in which an action is brought against a municipality “for damages in respect of injuries sustained through nonrepair of streets” the action is directed to be tried by a Judge without a jury—whatever be the cause of the nonrepair. “Nonrepair,” in my view, is an abstract noun, being the name of a state or condition of the street, and not a verbal noun meaning “not repairing.” If, then, a street which has something wrong in it, by reason of the misfeasance of the municipality, can be fairly said to be in a state of nonrepair, I am unable to see why the section does not apply to the case of an accident occasioned by such state or condition of the street.

It was argued that “nonrepair” is applicable properly only to a state caused by mere nonfeasance, and that the word “disrepair” should be applied to that caused by misfeasance. But the latter word is defined by the dictionaries in a manner which shews that the lexicographers did not connect the word necessarily with any act: *e.g.*, the Standard defines disrepair as “the state of being out of repair;” the Century, “the state of being out of repair or in bad condition—the state of needing repair;” Murray, “the state of being out of repair or in bad condition for want of repair.” The dictionaries seem not to contain the word “nonrepair;” but I cannot think its meaning to be at all obscure. “Non” is the general negating prefix to be found in many words in common use both in law, in literature, and in ordinary parlance—the word “nonrepair” can, I think, mean only “the state of being out of repair,” “the state of not being in repair.”

It is clear that such a state may be occasioned by the misfeasance of the municipality: *Borough of Bathurst v. Macpherson*, 4 App. Cas. 256, at pp. 265, 266, 267.

I am unable to say that the Legislature in the section referred to intended to restrict its application to the case of nonfeasance. Had this been the intention, it would have been easy to have expressed it clearly. I have in *Robinson v. Mills* (1909), 19 O.L.R. 162, at pp. 172, 173, spoken of the manner in which statutory provisions should be interpreted; and I still adhere to what was there said. The policy of legislation is for the Legislature; Courts should interpret the meaning of the Legislature by the words employed, and the meaning of these words is the meaning of the Legislature. ✓



I am aware that in a number of cases in our Courts the word "nonrepair" is used in contrast or quasi contrast with "obstruction" and the like, but in very many also the word "nonrepair" has been considered to include obstructions on the road. For example, in *Castor v. Township of Uxbridge*, 39 U.C.R. 113, at p. 122, Harrison, C.J., says: "When a highway is in such a state from any cause, whether of nature or man, that it cannot be safely or conveniently used, it may in a large and liberal sense be said to be out of repair. Whether the defect be an excavation caused by nature or man, or an addition making an obstruction caused by nature or man, it may be equally unsafe and equally inconvenient to the public to use the highway. The statute prescribes no standard of repair, nor does it in any manner declare what is to be deemed nonrepair." And the learned Chief Justice goes on to consider whether the statute applied to a case in which the municipality omitted to remove telegraph poles placed on the highway by a telegraph company, and he comes to the conclusion that this was an omission to keep the highway in repair. This was unnecessary for the decision, as the action was dismissed upon the ground of contributory negligence. See also *Lucas v. Township of Moore* (1878), 43 U.C.R. 334, at p. 339. But there are many cases in which such a condition of things has been held to render the municipality liable under the statute.

In *Gilchrist v. Township of Carden* (1876), 26 C.P. 1, overhanging trees likely to fall upon the highway are held to be in violation of the duty of the municipality to keep in repair; while in *Rounds v. Town of Stratford* (1875), 25 C.P. 123, at p. 128, Hagarty, C.J., seems to doubt if leaving a waggon on the road is such. In the same case in (1876), 26 C.P. 11, at p. 19, Gwynne, J., apparently distinguishes mere nonrepair from "nuisances which may not amount to defect in repair." Lister, J.A., in *Foley v. Township of East Flamborough* (1899), 26 A.R. 43, at p. 51, says: "Any object in, upon, or near by, the travelled path which might necessarily obstruct or hinder one in the use of the road for the purpose of travelling thereon . . . is, in my opinion, a defect or want of repair within the statute." But he was speaking of the case of a stump which had not been removed, the tree of which it was a stump having grown on the road allowance naturally.

In *Atkinson v. City of Chatham* (1899), 26 A.R. 521, a tele-

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.  
Riddell, J.

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.  
Riddell, J.

phone pole standing in the streets of Chatham was held by the Court of Appeal to constitute a violation by the municipality of the statute. The judgment was reversed by the Supreme Court, *Bell Telephone Co. v. City of Chatham* (1900), 31 S.C.R. 61, but upon other grounds. In *Huffman v. Township of Bayham* (1899), 26 A.R. 514, Lister, J.A., giving the judgment of the Court, quotes Patterson, J.A., in *Maxwell v. Township of Clarke* (1879), 4 A.R. 460, at p. 465: "Where the safety of travellers on the highway was endangered by obstacles placed upon the road by a stranger, just as it might have been endangered by an excavation made in the highway by a stranger, the effect in either case being to put the road out of repair." Also Osler, J.A., in *Rice v. Town of Whitby* (1898), 25 A.R. 191, at p. 198, speaking of obstructions placed upon the highway by wrongdoers: "The road is out of repair when by the existence of such obstructions it is rendered unsafe or inconvenient for travel." The *Huffman* case was a case of a milkstand projecting slightly over the travelled way, and the decision was that the road was "out of repair within the meaning of the statute."

There are a number of cases to the same effect, and I do not find that there are any authorities compelling us to limit the meaning of the word "nonrepair." The cases cited are not, of course, decisions upon the Judicature Act. The cases since the Act are mentioned in the judgment of the Master in Chambers, except, perhaps, *Armour v. Town of Peterborough* (1905), 10 O.L.R. 306, a judgment of the learned Master, and *Clemens v. Town of Berlin* (1904), 7 O.L.R. 33, a judgment of my learned brother Teetzel. The latter alone calls for remark. The statement of claim charged that the plaintiff was driving along a street in Berlin, and "that, owing to a steam roller unlawfully left standing on the public highway by the defendants, the plaintiff's horses became frightened and ran away." The learned Judge points out that there was no allegation that the highway was out of repair, but that the defendants committed an unlawful act in leaving the steam roller upon the highway, at which her horses took fright; he therefore reinstated the jury notice. I am not prepared to overrule this judgment as at present advised—if a plaintiff can make out a case of wrongdoing on the part of a municipality irrespective of their duty, common law and statutory,

as to highways, and allege a cause of action not based upon non-repair of the highways, he may be entitled to hold his jury notice. At all events, the case has no application here, where the injury is undoubtedly due to a defect in the highway itself. So far as the decision is based upon a distinction between nonfeasance and misfeasance, I am not (with great respect) prepared to follow it.

I think the appeal should be allowed.

We are not deciding that this is a case in which notice is necessary under the statute, or anything but the one point.

Costs should be costs in the cause.

BRITTON, J.:—I agree with the interpretation placed by my brother Riddell upon sec. 104 of the Judicature Act.

The nonrepair of streets, roads, and sidewalks, by reason of which injuries may be sustained, is a condition of the street, road, or sidewalk which may have arisen either by misfeasance or nonfeasance on the part of the corporation. Section 606 of the Municipal Act requires that every public road, street, bridge, and highway shall be kept in repair by the corporation, and on default . . . the corporation . . . shall be civilly responsible for all damages sustained by any person, by reason of such default.

In this case it is alleged that there was a hole in the street, in the boulevard or sidewalk. The substance of that allegation is that the sidewalk was out of repair—was not in repair—was in a state of “nonrepair.” For the purpose of the trial and determination of the question of liability, it seems to me not to matter how the nonrepair has arisen. The liability is not created nor is it increased or reduced by sec. 104. That section only provides the tribunal for determining it. The construction now put upon sec. 104 as to the meaning of “nonrepair” does not affect, much less bar, the right of recovery by reason of want of notice or by the limitation clause in sec. 606 of the Municipal Act. These things are quite distinct. The Lord Chancellor, in *Mayor, etc., of Shoreditch v. Bull*, 20 Times L.R. 254, at p. 255, says, speaking of a defective road: “Those who so disturbed the roadway were guilty of an act and not of a mere omission, and liability did not cease when the highway authority, against whom nothing but nonfeasance could be charged, took the place of the other. Those who first interfered were throughout responsible for a misfeasance.”

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.  
Riddell, J.

D. C.  
1910  
BROWN  
v.  
CITY OF  
TORONTO.  
Britton, J.

If the defendants are liable for a misfeasance that created the state of nonrepair, they may remain liable. Treating the condition as nonrepair for the purpose of trial, within the meaning of sec. 104 of the Judicature Act, should not have the effect of relieving the defendants from liability if such liability exists. If the defendants did wrong in creating a condition of nonrepair, and did a further wrong in not remedying the condition so created, it surely cannot be said that any decision as to the trial being by Judge or jury can be considered in determining the question of notice of action or of the time within which an action must be brought. The case of *Borough of Bathurst v. Macpherson*, 4 App. Cas. 256, was cited, and it seems an important case on the merits, but it affords no assistance in determining the only question before us in this appeal.

The appeal should be allowed and the jury notice struck out.  
Costs to be costs in the cause.

TEETZEL, J.:—I agree in the result.

D. C.  
1910  
Mar. 26.  
May 16.

[DIVISIONAL COURT.]

MORLEY v. PATRICK.

*Libel—Discovery—Person Libelled not Named—Examination of Defendant—Questions as to Person Intended—Privilege—Malice.*

In an action for a libel said to be contained in a letter written by the defendant to the husband of the plaintiff, the defendant, on being examined for discovery, admitted the authorship of the letter, but refused to answer questions directed to finding out who the person referred to in the letter as "lady friend" was—the plaintiff not being named in the letter. The defendant in his statement of defence denied all the allegations of the statement of claim, and said that, if the words were written and published of and concerning the plaintiff, as alleged, it was without malice and upon a privileged occasion:—

*Held*, that the defendant should answer the questions; the alleged libel having made a reference that could only be understood having regard to extraneous circumstances, the questions were relevant to shew that the plaintiff was the person who would be understood by her associates or persons acquainted with the circumstances, to have been referred to; and the questions were also relevant upon the issue as to malice raised by the defence of privilege.

Order of SUTHERLAND, J., affirmed.

MOTION by the plaintiff for an order striking out the defence for refusal of the defendant to answer certain questions upon his



examination for discovery, or for an order requiring him to attend at his own expense for re-examination and answer the questions.

March 19. The motion was heard by SUTHERLAND, J., at the Weekly Court at London.

*P. H. Bartlett*, for the plaintiff.

*G. S. Gibbons*, for the defendant.

March 26. SUTHERLAND, J.:—This is an action for an alleged libel said to be contained in a letter written by the defendant to the husband of the plaintiff.

The defendant, on his examination for discovery, admits his authorship of the letter. In the further course of the examination he is asked the following questions and gives the following answers:—

“Q. 34. By ‘lady friend’ in this letter, you meant the plaintiff in this action, Thomas Morley’s wife? A. I refuse to answer under advice of counsel.”

“Q. 102. Why did you say anything about them? What impression did you intend to leave on Morley’s mind about that? That was something even worse than this other? Is that what you intended to convey to him? A. Under advice of counsel I refuse to answer.”

Q. 105. Did you send any person out to Mr. Morley’s place . . . to interview him regarding certain statements, to ask him if certain statements were true regarding your own character, since this suit was commenced? A. Under advice of counsel I refuse to answer.

“Q. 106. Did you see the plaintiff’s husband, Mr. Morley, in regard to this case at Clandeboye or elsewhere since this action was commenced? A. Under advice of counsel I refuse to answer.

“Q. 107. Did you see plaintiff’s husband at Clandeboye or elsewhere in connection with this suit? A. Under advice of counsel I refuse to answer.”

“Q. 113. Did you intend when you wrote that letter that Morley should understand who you meant? A. Under advice of counsel I refuse to answer.

“Q. 114. Do you know who you meant? A. Under advice of counsel I refuse to answer.

D. C.  
1910  
MORLEY  
v.  
PATRICK.

D. C.

1910

MORLEY

v.

PATRICK.

Sutherland, J.

"Q. 115. Did you ever say on any occasion who it was Denham had made these statements about? A. Under advice of counsel I refuse to answer."

The plaintiff thereupon makes this motion, and asks for an order that the statement of defence be struck out, or that the defendant forthwith attend at his own expense before the examiner and answer certain questions, not set out in the notice of motion, but alleged by his counsel on the argument to be those above referred to. Much stress is laid upon an answer being obtained to question 34, some, but less, to questions 102, 113, 114, and 115, and not much to 105, 106, and 107.

In her statement of claim the plaintiff alleges that the defendant falsely and maliciously wrote and published of and concerning her in the said letter the words said to be defamatory and complained of.

The defendant, in his statement of defence, denies all the allegations in the plaintiff's statement of claim, and, in addition, says that, if the words were written and published as alleged, it was without malice and upon a privileged occasion. As to question No. 34 the plaintiff's counsel contends that he is entitled to an answer: (1) because it is with reference to a material fact in issue between the parties upon the pleadings, *viz.*, was it of and concerning the plaintiff that the words were written and published? (2) on the question of malice; and (3) as to damages and the measure thereof.

The defendant's counsel says that it is not material on any ground who was meant by the defendant or what meaning he intended to convey, as the defamation, if any, consists in the apprehension of those to whom the libel is communicated.

Without expressing an opinion on the materiality of the matters involved in the question otherwise, I think that, on the ground of malice and as to damages and the measure thereof, it is material that the plaintiff should know if the defendant meant her, and that he must answer the question accordingly.

The same applies to questions Nos. 113, 114, and 115; I do not think, on any ground, he can be required to answer questions Nos. 105, 106, and 107; and probably the same applies to 102.

The counsel on the argument expressed difficulty in finding authority exactly in point, and, after perusing the authorities cited and others, I have experienced the same difficulty.

The motion is, therefore, allowed, and I order that the defendant do attend at his own expense before the special examiner, Mr. Edmund Weld, at his office in London, at such time as he shall appoint, and upon one day's notice, and answer the said questions Nos. 34, 113, 114, and 115, or, in default, have his statement of defence struck out.

The plaintiff will have the costs of this application in any event of the cause.

The defendant appealed from the order of SUTHERLAND, J.

May 16. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

*Gibbons*, for the defendant. He should not be compelled to say to whom he intended to refer. In the proving of libel, the question is not whether the defendant intended to defame the plaintiff, but whether reasonable people would think the language to be defamatory of the plaintiff. The intention of the writer is immaterial. See *Wilton v. Brignell*, [1875] W.N. 239; *Jones v. Hulton*, [1909] 2 K.B. 444; *Hulton v. Jones*, [1910] A.C. 20; *Heaton v. Goldney*, [1910] 1 K.B. 754. The question of malice does not arise until the occasion has been shewn to be privileged.

*Bartlett*, for the plaintiff, was not called upon.

The judgment of the Court was delivered by MEREDITH, C.J.:—We think that the order was rightly made and must be affirmed. It has to support it *Wilton v. Brignell*, [1875] W.N. 239. That was an action for libel by a solicitor against the publisher of a newspaper. A summons was taken out to strike out certain interrogatories administered by the plaintiff to the defendant. From interrogatory 3, "Was not the passage set out in paragraph 3 of statement of claim intended by the defendant to apply to the plaintiff? If not, say to whom?" only the last words were ordered to be struck out. That decision is, as I understand, referred to in the text-books as still authority.

*Jones v. Hulton*, [1909] 2 K.B. 444, and [1910] A.C. 20, is distinguishable. There what the Courts were dealing with was the question whether it was material in an action of libel that the defendant did not intend to refer to the plaintiff. The defendant asserted that he did not intend to refer to the plaintiff, and

D. C.  
1910  
MORLEY  
v.  
PATRICK.  
Sutherland, J.

D. C.  
1910  
MORLEY  
v.  
PATRICK.  
Meredith, C.J.

did not even know him; and the observations of the Judges are directed to shewing that that was wholly immaterial, Lord Justice Farwell making the observation that it suffices if the thing is done carelessly or recklessly, because the essence of the action is that the words do defame, and it does not depend upon the intention of the person uttering them. A passage from the judgment of Lord Justice Farwell, at p. 480 of the King's Bench report, indicates that his view was that he was not deciding anything such as Mr. Gibbons argued is the law—that the writer of the defamatory matter cannot be interrogated as to whether the person to whom he intended to refer was the plaintiff. He says: "So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description," etc.—referring to cases where the words are recognised by the associates of the plaintiff as applying to him.

The alleged libel in this case does not mention any person by name, but makes a reference that can only be understood having regard to extraneous circumstances. Now, might it not be a most cogent argument, if there was evidence *pro* and *con*, to lead the jury to a conclusion as to which view to take, that the defendant had admitted, when interrogated, "I intended to refer to the plaintiff"? It would tend to strengthen the view that the plaintiff was the person who would be understood by the associates of the plaintiff or persons acquainted with the circumstances, to have been referred to.

Then privilege is pleaded, and I do not know why, privilege being pleaded, and it being essential to prove malice, if the occasion is shewn to be privileged, the evidence would not be admissible on that issue to shew that the defendant intended to strike at the plaintiff. The fact referred to by Mr. Gibbons, that that issue does not arise in the course of the trial until it has been shewn that the occasion was privileged, is wholly immaterial. It is one of the issues on the record, and discovery is not confined as the argument would confine it, but it is open upon any issue on the record which may in the course of the trial go to the jury.

The question in the other case which has been referred to, *Heaton v. Goldney*, [1910] 1 K.B. 754, was an entirely different



question. There the interrogatory was directed to ascertaining from the defendant what he meant by the words used. It seems to me that there is a plain distinction between the two cases. It was immaterial what the defendant meant. The question was, what meaning would be conveyed by the words to ordinary persons who heard or read them.

I think that the right of discovery should not be limited so as to prevent an inquiry of this kind being made. Costs to the plaintiff in any event.

D. C.  
1910  
MORLEY  
v.  
PATRICK.  
—  
Meredith, C.J.

[BOYD, C.]

STAVERT V. McMILLAN.

1910  
May 23.

*Banks and Banking—Illegal Trafficking by Bank in its own Shares—Directors—Promissory Notes Given to Repair Wrongdoing—Transfer of Shares—Consideration—Agreement—Indemnity—Holder in Due Course—Notice or Knowledge of Illegality—Evidence—Onus.*

The money of a chartered bank was used in purchasing shares of its own stock to the extent of about \$400,000. The shares acquired stood in the names of various nominees of the bank, who undertook no personal responsibility. The shares were bought to be again sold, and the plan was to keep up the price of the stock and to make possible profits—the whole transaction being arranged and carried out by the general manager of the bank:—

*Held*, that the money was illegally withdrawn from the funds of the bank and used in violation of the Bank Act, R.S.C. 1906, ch. 29, sec. 76; the transaction amounted to an illegal trafficking in the shares, was *ultra vires*, in disregard of public policy, and placed in jeopardy the charter of the bank.

The directors of the bank, in order to save the bank, divided the shares so illegally acquired among themselves and their friends, and they and their friends gave promissory notes to the bank for the shares. In getting notes from their friends and in putting shares in their names, the directors assured them that they were incurring no risk—that they would never be called upon to pay—that the shares were to be held in trust for the bank, and that all would shortly be paid out of the sale of the stock. These notes were indorsed by the bank to the plaintiff, and the plaintiff sued the makers of the notes thereon:—

*Held*, that, although the defendants considered that the notes were given for the accommodation of the bank, that was an understanding not recognised by any one representing the shareholders, and not binding on the bank as a corporate body; and on this branch of the case nothing was proved sufficient to outweigh the legal consequences arising from the making of negotiable promissory notes.

But, regarding the notes as given for value, represented by the transfer of shares to each defendant, and in the whole representing the \$400,000 of the bank's money illegally expended, which was the consideration, or at any rate a part of the consideration, as between the bank and the defendants, the bank had not the power to transfer the shares or enforce payment for them; the original acquisition of the shares was not merely voidable but void; it was a nullity, not to be validated by lapse of time or by any action of the bank or the shareholders; and the transfer of these shares to the

1910  
STAVERT  
v.  
McMILLAN.

defendants, in exchange for the notes sued on, was a sale of the shares, and a further act of illegality in violation of the statute; the bank had no power to sell or transfer the shares illegitimately acquired.

The bank could not undertake to indemnify the defendants in regard to their having become holders of the stock; the expenditure of the bank's money was a misfeasance in the first place, and any indemnification would be an agreement further to misuse the shareholders' money.

The bank had no legal title to the shares, and could confer none; so that, in the hands of any one having knowledge or notice of the facts or of the violation of the statute, the notes could not be enforced by action; and, upon the evidence, the plaintiff, as to fifteen of the notes sued upon, had sufficient notice of the situation to prevent his recovering.

As to the other nine notes, a case of illegal consideration was shewn, and the law cast the burden of proof upon the holder to prove both that value had been given and that it had been given in good faith without notice. The plaintiff had not given evidence on this head, and had not satisfied the Court of his right to recover; and, in the circumstances, the case should not be opened up to give him an opportunity to do so.

THIS was an action upon a promissory note for \$33,110 made by the defendant in favour of the Sovereign Bank of Canada and indorsed by the bank to the plaintiff.

By the statement of defence the defendant alleged: (2) that the statement of claim disclosed no cause of action; (3) that the plaintiff had no status to maintain the action; (4) that, if any note was ever made or indorsed as alleged, it was without consideration; (5) that, if any note was ever made or indorsed as alleged, which the defendant denied, the note was so made to the Sovereign Bank of Canada, and the bank, in consideration of the making, agreed with the defendant that he should not be sued on and should be under no liability upon the note, and that he should be fully indemnified by the bank in respect thereof; (6) in the alternative, that, if any note was ever made and indorsed as alleged, the making and indorsing were illegal and void, as having been a mere device for concealing and covering up the fact that the bank had purchased their own stock, and for enabling the bank to continue in the ownership of the stock, and the defendant pleaded the provisions of the Bank Act; (7) that, if the plaintiff was the holder of the alleged note, which the defendant denied, the plaintiff became such holder by transfer from the bank and with full notice of the facts set forth in paragraphs 4, 5, and 6 of this statement of defence; (8) that, if the plaintiff was the holder of the note, which the defendant denied, he held the same and now sued on behalf of and as trustee for the bank, and the bank were still the true holders of the note.

The defendant, on leave granted, brought in the bank as a third

party, and claimed to be indemnified by the bank against all liability under and in respect of the note and the costs of these proceedings.

A number of actions were brought by the same plaintiff against different defendants upon promissory notes made by the defendants in like circumstances.

January 13 and 14, and April 4, 5, 6, 7, 8. The actions were tried together by BOYD, C., without a jury, at Toronto.

*J. Bicknell*, K.C., and *F. R. MacKelcan*, for the plaintiff.

*Wallace Nesbitt*, K.C., *F. Arnoldi*, K.C., *H. S. Osler*, K.C., and *J. Wood*, for the several defendants.

*I. F. Hellmuth*, K.C., *A. W. Anglin*, K.C., and *W. J. Boland*, for the Sovereign Bank of Canada.

May 23. BOYD, C.:—That which underlies and affects this whole litigation is a series of dealings by which the money of the Sovereign Bank was used in purchasing shares of its own stock to the extent of about \$400,000. The shares so acquired stood in the names of various nominees of the bank—brokers, officers of the bank, and others—who undertook no personal responsibility, and whose names were in some cases used without their knowledge. The whole transaction was managed by the then general manager, Stewart, and there is no doubt that the money was illegally withdrawn from the funds of the bank and used in violation of the statute—the Bank Act, R.S.C. 1906, ch. 29, sec. 76. The shares were bought to be again sold, and the plan was to keep up the price of the stock and to make possible profits. This process amounted to an illegal trafficking in the shares, was *ultra vires*, in disregard of the public policy forbidding banks to engage in such a line of business, and placed in jeopardy the charter of the bank.

The bank, being in need of money, applied to New York financiers (the Dresdner Bank and J. P. Morgan & Co.), who had already lent much to the bank, and who were also the largest shareholders. Mr. Shuster (one of them) made investigation, and discovered that the funds of the bank had been largely expended in the purchase of its own shares. All further aid was refused unless some adjustment was made to put things right. It was probably this discovery which led Mr. Stewart to disclose to the directors of the

Boyd, C.  
1910  
STAVERT  
v.  
McMILLAN.

bank what the financial situation was, and to call upon them for assistance. The position of the directors is that they were not aware of these illicit dealings, and are not legally responsible for them; and that is an issue which has not been judicially determined, nor does it arise directly in the present actions. However, a meeting of the directors was called in March, 1907, at which Mr. Mitchell, the bank's solicitor, was present, and he then told the directors that, though they were not liable criminally, they were financially, and, acting on this advice, they agreed to sign a bond to become responsible for the amount, divided ratably among the seven directors, and to be bound severally, provided that all signed. One did not sign, who was absent in England, and he has not yet signed, but that is not now important, as the action is not in respect of the bond. This bond was taken by the solicitor with the view of satisfying the New York people; and it was given to them, but not apparently referred to later in the subsequent conference at New York. It was stated by one of the witnesses that the present inability of all the directors to make immediate payment, explains why the bond was not further used.

Then a meeting was held at New York on the 23rd March, 1907, in order to arrive at a solution of the difficulty satisfactory to the American financiers. The conclusion arrived at was expressed in a writing which rather alludes to than defines what was to be done. All parties present signed this memorandum, which is in these words:—

"The first matter discussed was the making of advances on its own stock by the Sovereign Bank of Canada.

"After discussion, it was decided that the directors should make such arrangements as would have the stock recently purchased, amounting in all to about \$400,000, and which is now used as security for loans by the bank, taken up either by individuals or trust companies, to which individuals or trust companies the bank may make advances upon proper security. The directors to make such arrangements with such individuals or trust companies as would make them willing to have the stock placed in their names."

The evidence is conflicting as to what was said at this meeting. According to the recollection of the directors present, the main



apprehension was as to the bank's charter; it was not a matter of the directors' liability or responsibility, but the position of the stock was to be changed; the directors were to get friends to take over the stock, upon whom there would be no personal responsibility; the money expended for the stock was to be raised by the sale of the stock, and, if there was any loss, it was to be borne by the bank. According to the recollection of the American witnesses, the bank was to be put in the same position as if the improper advances had never been made. The stock was to be taken over in such wise by the directors or their friends as to be held by solvent and substantial persons, and the advances were to be repaid by means of new loans made to these new holders on proper security.

I find no evidence of any agreement that the only source from which payment of the \$400,000 was to come should be the stock itself, and no evidence that the bank was to own the stock.

There was some delay in completing the contemplated arrangements, and they were carried out in another form, apparently without the immediate privity of the New York people. On faith of their being carried out, large moneys were advanced to meet the urgent needs of the Sovereign Bank. At length it was decided to divide up the block of stock into equal sevenths among the directors, and each seventh to be held in several names of the directors' relations or friends, so that too much money should not appear to be out on loans among the directors. For the portion of the shares so divided among the directors and their friends, promissory notes were given and indorsed to the bank—these notes were first in the form of time notes, and afterwards on the 1st May changed to notes payable on demand. After these notes were given, other large sums were also advanced by the American houses to the bank. In getting notes from their friends and in putting stock in their names, the directors assured them that they were incurring no risk—that they would never be called upon to pay—that the stock was to be held in trust for the bank, and that all would shortly be paid out of the sale of the stock. That such representations were so made and honestly made by and to the witnesses who have so testified, I have no doubt.

One of the main issues argued was whether the notes in suit were given for value, or, as the defendants contend, for the accom-

Boyd, C.

1910

STAVERT  
v.

McMILLAN.

Boyd, C.  
1910  
STAVERT  
v.  
McMILLAN.

modation of the bank. If the directors were personally liable to make good the illegal outlay, it would be a short step to find that the notes were given for value; but that is one of the disputed questions, and on the evidence as to the notes alone it is not so obvious.

The evidence is most contradictory, in appearance at all events, but the reason of much of this can be indicated. From the fact that the bond was signed by six of the directors, and that Mr. Stewart, the author of all the trouble, had described the situation in his own way to the shareholders in New York, they became impressed with the view that liability was admitted by the directors, and the matter in that aspect was not directly discussed. That may account for the meagre way in which the conclusions are expressed in the contemporaneous memorandum. The oral evidence consists very much in statements of what was understood; the New York people taking for granted that personal liability was not in dispute, and the directors assuming that they would never be called upon to pay, but that the bank would indemnify them, if any loss should arise after the sale of the stock.

No doubt, the directors considered and assured themselves that the notes they gave and procured to be given were for the accommodation of the bank, and that the stock transferred to them was still to be the property of the bank; and so they assured their friends who joined them. But this was a pact as between themselves, not recognised by any one representing the shareholders; and how did it bind the bank, as a distinct corporate body? On this branch of the case the conclusion seems to me inevitable that no defence is proved sufficient to outweigh the legal consequences arising from the signing and indorsing of negotiable promissory notes.

The notes, then, were given for value, represented by the transfer of shares apportioned to each, and in the whole representing in value the \$400,000 of the bank's money illegally expended.

This was, I think, the whole consideration as between the bank and the defendants; but, even if it was only a part, it is enough to raise the next important question: in how far can an action to enforce payment be entertained by the Court?

The evidence is very voluminous, but I have gone over with sufficient detail the leading facts to make intelligible the legal

aspect as I have been led to regard it. The case is of no small importance; it appears to be of first impression; and my endeavour has been to reach a well-founded conclusion.

We start with a transaction or series of transactions illegal in every sense. There was an unwarrantable misapplication of the bank's money, which was *ultra vires*, in the teeth of the Bank Act, and in violation of the public policy to be observed and maintained in the public interest. The Act says, an incorporated bank shall not, except as authorised by the Act, directly or indirectly, purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock: sec. 76, sub-sec. 2 (b). There was clearly a purchasing of shares, and the purchase was in order to their being again sold. That is a trafficking in its own shares, which is forbidden. For that authority will be found in *Hope v. International Financial Society* (1876), 4 Ch. D. 327, 339, and *Trevor v. Whitworth* (1887), 12 pp. Cas. 409, 417, 419, 428. The original acquisition of the shares was not merely voidable, but void; it was a nullity, not to be validated by lapse of time or by any action of the bank or the shareholders. This was so held by Lord Shand in *General Property Investment Co. v. Matheson's Trustees* (1888), 16 Rettie 282, approved by Col ins, M.R., as good law in English Courts in *Bellerby v. Rowland & Marwood's S.S. Co.*, [1902] 2 Ch. 14, 27; and to the same effect under our Bank Act by the Supreme Court in *Bank of Toronto v. Perkins* (1883), 8 S.C.R. 603.

Then what was the transfer of these shares to the defendants, in exchange for the notes sued on, but a sale of the shares? It was a dealing in them, sale as well as purchase alike contrary to the statute—though it may be with a view to remedy what had been done. This was not, however, an attempt to undo the first wrong step by seeking restitution of the money from the persons whose stock was acquired by the money of the bank, but rather to prosecute the illegal dealing to a fruitful result by a further sale of the tainted stock, and consequently by a further act of illegality in violation of the statute. Perhaps the only possible way of applying a practical remedy would be by the voluntary subscription and replacement of the wrongful expenditure by those interested in the integrity of the bank.

Going back to the bond given by the directors to guarantee

Boyd, C.

1910

STAVERT  
v.

McMILLAN.

Boyd, C.  
1910  
STAVERT  
v.  
McMILLAN.

the payment and to take over or otherwise dispose of the stock, it could not have been enforced in any Court of law or equity. The reason is succinctly given by Baron Bramwell in *Geere v. Mare* (1863), 2 H. & C. 339, 346: "The indenture declared on was executed as a security for the payment of a debt founded on an illegal consideration, and as the debt could not be enforced against the debtor, neither can it be enforced against the person who has executed the security for its payment." The result is the same if part of the consideration is illegal, for, as said in one of the cases, where the parties (as, *e.g.*, the bank and the directors) have woven a web of illegality, it is not part of the duty of Courts to unwind the threads.

Considered as between the bank as holder and the defendants (directors and others, their friends), the case appears to be that of the bank adopting the shares bought with its own money and selling them to strangers for a price sufficient to recoup the first illegal outlay.

The situation would be different if the bank had repudiated the original transaction, and had brought suit individually against the directors said to be privy to or implicated in the illegality. That remedy, I suppose, is still open to the bank. So upon a winding-up of the bank the directors and others might be liable for the payment of these shares standing in their names, and might also incur the double liability attaching to such shares, but that would be because the liquidator would have a right of action superior to that of the bank.

I would dwell a little more on this phase of the action. The shares in question are ear-marked, and, being bought as part of an illegal transaction, are tainted thereby. What power then has the bank to deal in, sell, or transfer such shares illegitimately acquired? The Bank Act does sanction and provide for the sale of shares legitimately acquired under secs. 77 and 78 in the course of business, but not so as to shares illegally obtained. The dealing in the bank's own shares is forbidden except as authorised by the Act: sec. 76, sub-sec. 2 (b). Having illegally obtained these shares at the outset, it appears to me that the bank has come to an *impasse*, to be resolved only by the voluntary intervention of some one willing to pay the price and shoulder the burden; but not resolvable by the active intervention of any Court. The



claims of public policy contemplated and defined by the Act in its prohibitions are paramount to the interests of the parties *inter se*.

I think the bank has not power to transfer these shares or enforce payment for them against an unwilling purchaser. The bank has no legal title to the shares, and can confer none; so that, in the hands of any one having knowledge or notice of the facts or of the violation of the statute, the notes cannot be enforced by action.

This legal result of the facts indicates the practical impossibility of the bank undertaking to indemnify the defendants in regard to their having become holders of the stock. The expenditure of the bank's money was a misfeasance in the first place, and any indemnification would be an agreement further to misuse the shareholders' money.

Upon the evidence it appears that fifteen of the notes sued on required to be indorsed to the plaintiff after the 18th January, 1908, before he would acquire title thereto or become a holder in due course. This indorsement was said to be (in a letter of the plaintiff's solicitor) about the 1st March, 1908; according to the evidence of Mr. Jemmett, the officer who indorsed for the Sovereign Bank, he did so "early in March." Stavert did not get the notes, he says, till after the beginning of March. The directors, it appears, obtained a legal opinion as to their liability on the 9th February. On the 21st February a letter was sent by Mr. Jarvis to the directors suggesting a talk with Stavert, and, pursuant to that, the plaintiff was seen first by Mr. Dymont (a defendant) and again by Mr. Dymont and Mr. McNaught in company—this last about eight or ten days after the letter of the 21st. Ten days would be on the 1st March, and then occurred a conversation in which the directors talked of these notes and the stock that the bank had bought, and that the notes were given for the convenience of the bank—that they should not be among the assets, and that they were not liable upon them. Mr. Stavert was then about to go to New York to see the Morgans, and said he would consider the matter, but said little. According to Mr. Dymont's evidence, he had a conversation with Mr. Jarvis, the manager of the bank, who said Mr. Stavert knew that the notes were disputed before they were indorsed to him.

Boyd, C.

1910

STAVERT  
v.  
McMILLAN.

Boyd, C.

1910

STAVERT

v.

McMILLAN.

These statements are not controverted or explained by the plaintiff, who was not called as a witness; and my conclusion is as to these fifteen notes that he had sufficient notice of the situation as between the directors and the bank as to this stock being purchased with the bank's moneys and as to the way in which the notes sued on were given.

As to these fifteen notes the actions fail and should be dismissed; but no costs are given, where the defence is illegality.

As to the other nine notes, a case of illegal consideration is shewn, and in that event the law casts the burden of proof upon the holder to prove both that value has been given and that it has been given in good faith without notice. See Bills of Exchange Act, sec. 58, and *Tatam v. Hasler* (1889), 23 Q.B.D. 345. Suggestive circumstances are in evidence as to these notes, *e.g.*, the refusal of the Morgans to accept them as commercial security for advances, and the fact that Mr. Stavert was in touch with the Morgans, so that he may have been well advised in not tendering any evidence on this head. In ordinary circumstances, there would be jurisdiction, on a proper application, to open up on terms for a further trial. But, having regard to the situation of the defendants, who came in as parties in aid of the directors, and who are entirely volunteers, relying on credible assurances that their signatures were mere matters of form, and to the situation of the directors (defendants), who are open to be pursued for their alleged privity with the general manager in respect of the whole sum involved, as joint tort-feasors, and to the common danger of both sets of defendants to be called upon in the event of winding-up proceedings to make good the amounts represented by the shares they hold, and also for the double liability of shareholders, I think it more advisable not to litigate further on this record as to the knowledge or notice possessed by the plaintiff when the notes payable to bearer came to his hands. It is better, in my opinion, to dismiss this part of the controversy also without costs.

[MIDDLETON, J.]

RE SOLICITOR.

1910

May 27.

*Solicitor—Retention of Client's Money—Order for Delivery of Bill of Costs—Disobedience—Attachment—Settlement—Receipt—Promise to Pay "Retainer"—Inability to Prepare Bill.*

A solicitor received for his client, as the result of the settlement of an action in which the client was plaintiff, \$2,600, and paid her \$645, retaining the balance, but delivering no bill. In a document drawn by the solicitor, the client agreed to pay him "a retainer of \$2,000." The solicitor swore that he paid the client \$645 in full of all claims, and produced a copy of a cheque for \$645 marked "in full of all claims." The solicitor was ordered to deliver a bill of his costs, and, upon his failing to do so, a motion was made to attach him for his disobedience. It was stated that the solicitor was unable to prepare and deliver a bill. The solicitor also set up that the sum of \$2,600 was intended to include \$740 costs agreed to be paid by the defendant in the action:—

*Held*, that, assuming that the defendant paid the plaintiff's costs of the action, fixed at \$740, the plaintiff's solicitor received it as agent and trustee for the plaintiff; the solicitor was not a party to the agreement.

2. That a promise to pay a "retainer" cannot be enforced in law; a retainer is a gift by the client to the solicitor, and, like all gifts, must be a voluntary act.
3. That there can be no binding settlement between solicitor and client without a bill; and, apart from this, it was not shewn that the client was advised of her rights when she made the alleged settlement by accepting \$645 "in full of all claims;" and, as the solicitor still asserted his right to the "retainer," it was fair to assume that it was a factor in the settlement, and the client would not be bound.
4. That the suggested inability of the solicitor to prepare a bill afforded no excuse for disobedience to the order.

An order was made for an attachment, but not to issue for two weeks, and if, in the meantime, the solicitor should deliver a bill or a statement in writing that he made no claim against the client for costs or disbursements, the order should not issue.

MOTION by a client for an attachment of the solicitor for disobedience to an order made on præcipe on the 11th February, 1909, requiring him to deliver a bill within fourteen days after service of the order. This order was served on the 12th February, 1909, and had been neither moved against nor complied with.

May 26. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*R. McKay*, for the applicant.

*E. Meek*, K.C., for the solicitor.

May 27. MIDDLETON, J.:—The applicant shews that on the 2nd October, 1908, the solicitor received for her, as the result of the settlement of some litigation, \$2,600, and has paid her \$625, retaining the balance, \$1,975, presumably as representing the costs of this litigation, but no bill has ever been delivered.

Middleton, J.

1910

RE

SOLICITOR.

The solicitor, after several enlargements, sets up as an answer to the motion:—

(1) That the settlement of \$2,600 was intended to include \$740 costs agreed to be paid by the defendant in the action.

(2) A letter from the client to the solicitor of the 8th September, 1906, proposing to give him fifty shares (*i.e.*, one-fourth) of the stock in question in the action, if the solicitor “would take the case up and bear all expense and run the risk”—a proposition which the solicitor did not accept.

(3) A document bearing date the 1st September, 1906, but not signed till some time later, by which the client retained him in the contemplated litigation. This document, drawn by the solicitor, contains the clause, “I agree to pay you a retainer of \$2,000.”

(4) The solicitor then says that on the 20th October, 1908 (the litigation having been settled on the 2nd), he paid the client \$645 in full of all claims, and produces a copy of a cheque for \$645 marked “in full of all claims.” The original documents are not produced or accounted for by the solicitor, and neither solicitor nor client gives any explanation of the circumstances connected with the giving of this cheque.

(5) The solicitor then says that, after the order in question had been served, he and his Toronto agent “protested” “that no bill of costs in the said action had been kept by me,” this forming one of a long list of matters said to have been “protested,” but the solicitor nowhere states that he is unable to prepare a bill of his costs against his client.

Upon the argument counsel for the solicitor stated that the solicitor is unable to prepare and deliver a bill, and is prepared to rely upon his right to claim the \$2,000 fee promised by the agreement of the 1st September, 1906, and upon this right alone. Lest this position should have been taken without due consideration, I propose allowing the solicitor a *locus penitentiæ*.

If he choose to adopt the course taken in *In re Griffith* (1891), 7 Times L.R. 268, and deliberately to give up all claims and demands against the client either for remuneration for services rendered or moneys disbursed, in the event of his being unable, as I think he is, to maintain his claim to the \$2,000 “retainer,” the client cannot well object. In that event the reference will pro-



ceed for the purpose of ascertaining the amount due the client, and in due course an order for payment over will, no doubt, follow.

Dealing with the matters set up by the solicitor, in the order above indicated. The settlement, on its face, does not bear out the solicitor's statement—the \$2,600 is payable as one sum representing the dividends accumulated upon the stock in question and costs. But, assuming that the defendant paid the plaintiff's costs, fixed at \$740, the plaintiff's solicitor received this sum as agent and trustee for the plaintiff. The agreement of settlement is, as, indeed, it purports to be, a settlement between the parties to the litigation; the solicitor was not any party to the agreement. The solicitor does not set up any tripartite agreement by which the defendant assumed the client's obligation to him, and the client assented to his receiving such sum as the defendant might be willing to pay. The solicitor did not so understand the situation, for, instead of resting content with the \$740, he retained \$1,955, if his own figures are accepted.

The letter of the 5th September affords no answer; the client's proposition was not accepted. If accepted, the agreement would have been champertous and void.

The promise to pay a "retainer" is void. Apart from special statutory authority, any agreement between a solicitor and his client by which the solicitor stipulates for remuneration upon any basis other than that provided by law, *i.e.*, a solicitor and client bill in accordance with any tariff applicable and subject to taxation, is void: *Re Solicitor* (1907), 14 O.L.R. 464. No statute authorises such an agreement as that here set up. I may also point out that there can be no promise to pay a "retainer" which will be enforced in law. A retainer is a gift by the client to the solicitor, and, like all gifts, must be a voluntary act.

With reference to the settlement suggested by the copy of the cheque produced: there was no bill, and there can be no binding settlement without a bill: *In re Bayliss*, [1896] 2 Ch. 107. Apart from this, the solicitor's affidavit does not shew that the client was advised of her rights, and, as the solicitor still asserts his right to the "retainer" under the agreement of the 1st September, it is fair to assume that this retainer was a factor in the settlement, if settlement there was, and, this being so, the client would not be bound by it.

Middleton, J.

1910

RE

SOLICITOR.

Middleton, J.

1910

RE

SOLICITOR.

The fact that the costs between party and party amounted to \$740 according to the solicitor's statement, and the amount retained for solicitor and client costs is \$1,955, called for explanation, and the solicitor is silent on this point.

Lastly, as to the suggested inability of the solicitor to prepare a bill. On the material this is not proved as a fact, and, if it were, it would not afford any excuse. The solicitor may be unfortunate if he has not made regular entries, relying upon the supposed agreement, but this neither justifies treating an order of the Court with contempt, nor does it afford any redress to the client whose money the solicitor has.

Even if there had been a valid agreement, the solicitor owed a duty to his client to keep a proper record of the business done, as the preparation of a party and party bill might have been assumed to be, in the event of success, necessary in the client's interest.

*In re Ker* (1849), 12 Beav. 390, is widely different in its circumstances from this case, and cannot be regarded as an authority of general application. There is nothing in the judgment or report to warrant the head-note. *In re Whitcombe* (1844), 8 Beav. 140, there cited, seems to shew that, under the law as it then stood, the agreement was lawful and binding, and the judgment may well have turned on that ground.

The warning given in that case by the Master of the Rolls (p. 144) (adopted by the Supreme Court in *Knock v. Owen* (1904), 35 S.C.R. 168, 172) as to the danger of agreements of the kind in question and the duty of the Court to guard the client, is not without point in this case.

The order will go for attachment. The attachment will not issue for two weeks, and if in the meantime the solicitor delivers a bill or a statement in writing that he makes no claim against the client for costs or disbursements, it will not then issue.

The solicitor must pay the costs of these proceedings in any event of the reference under the order already made, and the amount of such costs will be taken into account in ascertaining the balance upon the reference.

[TEETZEL, J.]

## MICKLEBOROUGH v. STRATHY.

1910

*Landlord and Tenant—Lease—Termination—Temporary Occupation—Eviction.*

May 28.

The plaintiffs, tenants of business premises under a lease for five years from the defendant, sublet to one who occupied for a year, and, the premises becoming vacant, engaged the defendant to procure another subtenant. The defendant, wishing to repair the adjoining premises, made a temporary arrangement with R., the tenant of those premises, under which R. moved into a part of the plaintiffs' premises, for which he agreed to pay a small rent, to allow a "to let" notice to remain up, and to shew the premises to prospective subtenants. This was done without consulting the plaintiffs:—

*Held*, in an action for a declaration that the lease was determined by the acts of the defendant, that to succeed the plaintiffs must shew an eviction, and that what was done by the defendant did not amount to an eviction, especially because it was plain that the defendant did not intend to terminate the lease, or to do more than permit a temporary occupation in the interest of the plaintiffs.

By lease dated April, 1907, the defendant leased to the plaintiffs the ground floor and cellar of No. 179 Bay street, Toronto, for five years from the 1st May, 1907, at \$50 per month, under which lease the plaintiffs took possession, and sublet the same to a merchant-tailor, who occupied the premises for about a year, when he failed, and the premises became vacant.

The defendant was engaged by the plaintiffs to secure another tenant for them, which he endeavoured to do by advertising and by putting up a "to let" notice in the window of the vacant premises.

The defendant also represented the owner of the adjoining premises, No. 177 Bay street, and other adjacent premises.

During the first week of November, 1908, the defendant, being desirous of doing some repairs in number 177, arranged with the tenant of that premises, one Ritter, who was a cobbler, to remove his bench and some other trifling effects into No. 179, the premises in question, subject to the provision that he should remove therefrom upon request without delay, and during his occupancy, which was not of the entire premises but only of the ground floor, he should pay a rental of \$3 per week, and should allow the "to let" notice to remain up, and should shew the premises to prospective tenants who might call.

The defendant did not consult the plaintiffs before putting Ritter into the premises, and, as soon as they discovered the fact that he was occupying them, they wrote the defendant notifying

1910

MICKLE-  
BOROUGH  
v.  
STRATHY.

him that, as he had seen fit for his own purposes and advantage to retake possession of the premises, and had caused them to be occupied by the tenant of his adjoining store, they looked upon that act as at once releasing them from further liability under the lease, and since that notice the plaintiffs refused to pay further rent.

This action was brought for a declaration that the lease was determined by the acts of the defendant, and that the plaintiffs were no longer liable for the rent in respect thereof.

The plaintiffs, in their statement of claim, charged that the defendant resumed possession of the premises for his own purposes, and acted in a manner inconsistent with the continuance of the plaintiffs' lease, and put in possession of the premises a person called Ritter, carrying on a shoemaking or repairing business, whereby, the plaintiffs alleged, the defendant had put an end to the lease.

The defendant set up the circumstances in connection with placing Ritter in possession, and denied that he resumed possession for his own purposes, or that he acted in any way in a manner inconsistent with the continuance of the lease, or that he had put an end to the same, and the defendant counterclaimed for the rent from the 1st November, 1908.

February 7. The action was tried at Toronto before TEETZEL, J., without a jury.

*A. C. McMaster*, for the plaintiffs.

*George Bell*, K.C., for the defendant.

May 28. TEETZEL, J. (after setting out the facts as above):— I find upon the evidence that in putting Ritter in possession of a portion of the premises the defendant did not intend to terminate the lease which he had made to the plaintiffs, but that he intended Ritter's occupation to be only temporary, and, while it was for the convenience of Ritter pending the repairs to premises No. 177, it was also intended to be to the advantage and for the benefit of the plaintiffs, because it was Ritter's duty under the arrangement to shew the premises to prospective tenants, and he was also under obligation to leave immediately upon request; and I further find that, immediately upon receiving the plaintiffs' notice, Ritter quitted the premises, and was moved into another premises owned or controlled by the defendant.



In order to entitle the plaintiffs to succeed, it was incumbent upon them to establish facts which would in law constitute an eviction by the defendant. It seems to me that the facts fall entirely short of such a result. To constitute an eviction, the lessee must establish that the lessor, without his consent and against his will, wrongfully entered upon the demised premises and evicted him and kept him so evicted, and the act done by the landlord must be of a permanent character and not a mere trespass or some act done for a temporary purpose unless with the intention of depriving the tenant of the enjoyment of the premises. See *Foa on Landlord and Tenant*, 4th ed., p. 166.

In *Upton v. Townend* (1855), 17 C.B. 30, at p. 64, Jervis, C.J., in defining eviction, says: "I think it may now be taken to mean this,—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises."

And in *Newby v. Sharpe* (1878), 8 Ch. D. 39, at p. 51, Thesiger, L.J., says: "In considering whether there is an eviction you must look not merely at the act of entry but to the circumstances of the case, and the intention with which the entry was made."

See also *Ferguson v. Troop* (1890), 17 S.C.R. 527, and especially at p. 579, where Patterson, J., after adopting the definition of eviction as expressed by Jervis, C.J., in *Upton v. Townend*, *supra*, says: "The fact that the tenant was deprived of the enjoyment of the premises or some part of them by the act of the landlord would, no doubt, be a fact admissible in evidence on the issue as to the intent with which the act was done, but it would be only one fact to be considered by the jury along with all the other evidence that bore on the issue."

Upon all the evidence and circumstances in this case, it is impossible to find that what was done by the defendant amounted to an eviction of the plaintiffs, especially because it is quite plain that the defendant never intended to terminate the lease or to evict the plaintiffs, or to do anything more than to permit a temporary occupation by Ritter in such a way as he believed it was in the interest of the plaintiffs that he should do.

Ritter paid \$3 for his occupancy, which was credited to the plaintiffs.

Teetzel, J.

1910

MICKLE-  
BOROUGH

v.

STRATHY.

Teetzel, J.

1910

MICKLE-  
BOROUGH

v.

STRATHY.

The action must be dismissed with costs, and the counterclaim allowed with costs.

The amount which the defendant is entitled to on his counterclaim will be the rent from the 1st November, 1908, until action, together with interest from the due dates thereof, less the \$3 paid by Ritter. If the parties cannot agree upon the amount, the same will be found by the Registrar.

[MULOCK, C.J.EX.D.]

1910

LOBB V. LOBB.

May 28.

*Will—Construction—Gift to “Children”—Previous Mention by Name of Illegitimate Children—Exclusion of Legitimate Children—Inference from Language of Will and Surrounding Circumstances.*

The testator, dying in 1883, left a wife and children in England, whom he had deserted in 1853. At the time of his death he was living in Ontario with H., a woman whom he called his wife, and by whom he had several illegitimate children, who also lived with him. So far as appeared, there had been no communication between him and his wife and legitimate children since he deserted them. By his will he made specific devises and bequests to H. and his illegitimate children, referring to them by name and as “my wife,” “my son,” “my daughter.” He then directed that the residue should be divided among his “children:”—

*Held*, that *prima facie* “children” imports legitimate children only, but that interpretation yields where a contrary intention, which the law is entitled to regard, appears; and in this case, having regard to the surrounding circumstances and the wording of the will, there was so strong a probability of the testator’s intention to include only the children of H. in the word “children” wherever used in the will, that a contrary intention could not be supposed; and it was therefore declared that they alone were entitled to share in the residue.

Review of the authorities.

THE plaintiffs, by this action, claimed, as sons of Charles Lobb, deceased, a share in his estate under his will.

The defendant, Charles Garfield Lobb, an illegitimate son of Charles Lobb, denied that the plaintiffs were the children of the testator, and set up that, even if they were, they were not entitled to take under his will.

The facts are stated in the judgment.

May 16. The action was tried before MULOCK, C.J.Ex.D., without a jury, at St. Catharines.

H. H. Collier, K.C., for the plaintiffs.

E. D. Armour, K.C., and M. J. McCarron, for the defendant.

May 28. MULOCK, C.J.:—At the trial I disposed of the first point, holding that the plaintiffs were children of the testator by his wife Fanny Atwood, and were born in wedlock.

The evidence shews that the testator was married to Fanny Atwood in England on the 2nd December, 1838, that he lived with her there until the year 1853, when he deserted her, and came to America, since which time there had been no communication between them. There were six children, including the plaintiffs, issue of the marriage. Fanny Atwood survived her husband, the testator, who died on the 17th March, 1883. About the year 1874 Charles Lobb became a resident of St. Catharines, living there with one Hannah Lobb as his wife, and by her he had four children, namely, Jenny, born on the 10th September, 1864, Charles Garfield, born on the 24th May, 1868, James Algie, born on the 15th August, 1870, and Annie, born on the 3rd October, 1874. Jenny predeceased the testator, and the three surviving children were infants living with their parents when the father, Charles Lobb, died in 1883. Hannah, their mother, died in the year 1909. The three surviving children, Charles Garfield, James Algie Lobb, and Annie Lobb, are illegitimate; and the question arises who are entitled under his will to the benefits given by the testator to his "children."

His will bears date the 26th February, 1883, and is as follows:—  
 "I give devise and bequeath to my son Charles Garfield Lobb, his heirs and assigns" (a certain farm). . . . "I give, devise and bequeath unto my son James Algie Lobb, his heirs and assigns" (a certain other farm). . . . "I give devise and bequeath unto my daughter Annie Lobb, her heirs and assigns" (the brick house, etc.). . . . "I give devise and bequeath unto my dear wife Hannah Lobb the house premises and lots in my possession on Church street in the said city of St. Catharines . . . with all the household furniture, horses, waggons, and carriages, and all effects in and about the dwelling-house at the time of my decease, for and during the term of her life, as also the house and lot on James street in the said city of St. Catharines, as now occupied by Mrs. Osborne and her son, to my said wife for and during her life, and after her death to go to and be divided between my children, share and share alike, or the survivors of them, but in case they cannot agree on a division the executors hereinafter

Mulock, C.J.

1910

LOBB

v.

LOBB.

Mulock, C.J.

1910

LOBB

v.

LOBB.

named to have power to make sale of or divide the same equally, and to make all necessary deeds and conveyances for such purpose. The homestead and furniture to be kept for the use and support of my wife and children during her lifetime, but no sale to be made until my youngest child becomes of age. I also give and devise to my executors my farm in North Pelham and all the stock thereon, with power for them to sell the same . . . and apply the proceeds . . . for the support and maintenance of my wife and children until the youngest child becomes of age, and then divide the said proceeds as follows: one-third to my wife and the balance between my said children or the survivor of them, share and share alike. . . . I give devise and bequeath unto my said executors the premises known as the Hardy block in the city of St. Catharines containing three stores . . . with power to them to collect rents and lease the same and apply all rents for the support and maintenance of my said wife and children until my youngest child becomes of age, and then in case my children cannot agree among themselves as to an equal division of the same my executors to have full power either to sell the same or to divide or apportion. . . . As to all lands I have in Pennsylvania . . . I give to my executors to sell . . . and apply the proceeds for the support and maintenance of my said wife and children. . . . The stone quarry . . . I give, devise the same to my executors in trust to sell . . . and apply the proceeds . . . for the support and maintenance of my said wife and children . . . and all moneys belonging to me at the time of my decease and debts of every kind or description, whether secured by mortgage or otherwise. . . . I give to my said executors to collect, sell, or realize . . . for the benefit and support of my said wife and children, and it is my expressed will and intention that in the event of any of my children dying without issue before my youngest child becomes of age his or her share of my estate shall go to the survivors, share and share alike, and I do hereby require my executors . . . to invest all moneys and apply the interest . . . for the support and maintenance of my said wife and children until the youngest child becomes of age, and divide the amounts then in their hands or in trust between my said wife and children or the survivors of them. I appoint my dear wife Hannah executrix, my son Charles Lobb and my friend Peter Algie executors," etc.



When the testator executed his will, the circumstances were as follows. His wife, Fanny Atwood, and their legitimate children, whom he had deserted in the year 1853, were living in England, no communication having, so far as appears, passed between the English family and the testator since his desertion of them. The testator was living with Hannah Lobb as his wife, with their then three surviving children, the eldest, Charles Garfield Lobb, being then about fifteen years of age, James Algie being about thirteen years of age, and Annie, nine years of age.

During his residence in St. Catharines the testator treated and represented Hannah Lobb as his lawful wife, and their children as their lawful issue, having them registered as such in the records of St. George's Church, St. Catharines.

The question to be determined is, who of his children are included under the word "children" in his will. *Primâ facie* the word "children" imports legitimate children only, but this interpretation yields where a contrary intention, which the law is entitled to regard, appears.

Running through the cases are to be found numerous judicial views dealing with the rule for giving to the word "children" a construction different from its ordinary legal meaning. For example, in *Hill v. Crook* (1873), L.R. 6 H.L. 265, 276, Lord Chelmsford, referring to the subject, says: "This construction" (that "children" *primâ facie* means legitimate children) "will not yield to mere conjecture, or to anything short of the clearest evidence of an opposite intention. . . . If a devise or bequest is made to children as a class, and there is nothing to indicate a contrary intention, the law undoubtedly appropriates the gift to lawful children only; but if a different intention is manifest (and in stating the proposition a different intention is assumed) illegitimate children will be allowed to take as a class." In the same case Lord Cairns (at pp. 282, 283) expressed the view that the *primâ facie* interpretation of the word "children" . . . may be departed from "where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children."

Mulock, C.J.

1910

LOBB

v.

LOBB.

Mulock, C.J.

1910

LOBB

v.

LOBB.

In *Dorin v. Dorin* (1875), L.R. 7 H.L. 568, 573, Lord Cairns, returning to the subject, says: "I feel myself bound to ask whether, with a knowledge of the position, and what are called the surrounding circumstances, at the time the testator made his will, there is anything upon the face of the will which enables me to say that those who in the eye of the law were not his children, were intended by him to take under the general expressions used in his will." In the same case Lord Selborne, at p. 577, says: "The word 'children' in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them." In the same case Lord Hatherley says (p. 575): "The only mode in which the word 'children' can be made to bear a different sense from that which is its first legal and natural sense is this, that if you look to the outward circumstances as well as to the expressions contained in the will, and find that the outward circumstances of the case, combined with the expressions contained in the will, fail to give any adequate or intelligible sense to the will, then you have at once to arrive at the conclusion that the word 'children' has been used in some other or different sense."

In *In re Haseldine, Grange v. Sturdy* (1886), 31 Ch. D. 511, 518, Bowen, L.J., says: "Now to construe the will, the Court is entitled to use the circumstances which surrounded the testator, not for the purpose of speculating as to what his intention was, but for the purpose of throwing light upon the true meaning of his words."

In the present case legitimate as well as illegitimate children survived the testator, and both classes may share if it is established that such was the testator's intention. The word "children" is a generic term, including both classes. A testator is entitled to bequeath his property to his children, legitimate and illegitimate, or to any to the exclusion of the remainder, and, if it is manifest that he intended the word "children" to include both classes, both may take.

A contrary view was held in *Bagley v. Mollard* (1830), 1 R. & M. 581; but it is now well settled that in a gift to "children" both classes may take if such be the manifest intention of the

testator. The authorities on this point are collected at p. 281 of the 6th ed. of Theobald's Law of Wills.

The defendant contends that the word "children," as used in the will, was intended to include only the defendant, his brother James, and his sister Annie, to the exclusion of the testator's lawful issue. The onus is on the defendant to satisfy the Court that such is the proper interpretation.

In an earlier case of *Worts v. Cubitt* (1854), 19 Beav. 421, the testator directed his executors to carry on his business of farmer, "until my youngest or youngest surviving daughter shall attain the age of twenty-one," and pay and apply the proceeds for the benefit of Anne, his wife "and of Anne my natural daughter, and of all other my daughters," and invest the surplus; and "when such youngest or youngest surviving daughter shall have attained the age aforesaid," the farming stock was to be sold, and the money arising therefrom "to be paid to and equally divided amongst my said wife and all my daughters, share and share alike." The testator had two legitimate daughters, and one illegitimate, namely, Anne; and it was held that Anne was included in the class of daughters and entitled to share with them.

In *Megson v. Hindle* (1880), 15 Ch. D. 198, the testator bequeathed a legacy of £500 "unto my grandson James (the son of my daughter Alice Jane, and who is now residing with me)," and then made a subsequent gift of a legacy of £2,000 to "the children of my said daughter Alice Jane." Jessel, M.R., says: "No doubt, the testator clearly recognises James as his grandchild; but then we find a subsequent gift of a legacy of £2,000 simply to 'the children of my said daughter Alice Jane.' According to the decision of the House of Lords the word 'children' without a context means legitimate children. If that is so—if the gift to 'children' includes only legitimate children—where is the context here to take it away from them? The testator does not say in the previous gift to his grandson James, that James is to be treated for all the purposes of his will as his legitimate grandchild; he simply describes him in the previous gift as 'my grandson James.' He was no doubt his grandson by nature; he knew he was illegitimate. Then, the daughter having other children who were legitimate, why should I go out of my way to say that her illegitimate son is to take? That son has a separate provision made for him. Why

Mulock, C.J.

1910

LOBB

v.

LOBB.

Mulock, C.J.

1910

LOBB

v.

LOBB.

should I say that there is a necessary inference, not a mere probability, that the testator intended him to participate in the other gift?" This decision was affirmed in appeal, Cotton, L.J., saying: "To take a case out of the common rule that only legitimate children can take under a gift to 'children,' there must be on the face of the will such a strong probability of the testator's intending to include illegitimate children, that a contrary intention cannot be imputed to him. . . . It is said that such an implication is furnished by the fact that the testator describes him as a son of Alice Jane. But the testator does not refer to him in the same terms as the other children; he speaks of him as 'my grandson James, son of my daughter,' a mode of description which would be more natural in the case of an illegitimate than of a legitimate child. *Hill v. Crook*, L.R. 6 H.L. 265, is the only case in which illegitimate children who had not been described as children were allowed to take; but in that case the parents were spoken of as husband and wife, and it was a necessary inference that the testator intended their children to take though the marriage was invalid. In all the other cases in which illegitimate children have taken, they have been referred to as children, or there have been circumstances shewing that the gift could not have been intended for legitimate children. Here we have nothing but the fact that James Mitchell has been mentioned as a grandson of the testator and a son of Alice Jane. And I think that is not enough, especially when we observe that the testator has made a separate provision for him." In the same case Thesiger, L.J., says: "I am of the same opinion. In order to enable illegitimate children to take under a gift to children, there must be a plain and clear inference from the terms of the will leaving no doubt that they were intended to take: and I cannot find such plain and clear inference in this case."

In *In re Walker*, [1897] 2 Ch. 238, 242, commenting on *Megson v. Hindle*, Romer, J., says: "When the circumstances of that case are considered, it will be seen that the testator had treated the illegitimate child separately from the other or legitimate children, and had not shewn any intention to regard him as legitimate for the purposes of his will or to include him in the general term 'children.' "

In *In re Bryon* (1885), 30 Ch. D. 110, the testator bequeathed



a legacy to "Maud Barnes Bryon, daughter of my nephew, John Bryon," and gave the residue of his estate to his trustees "upon trust to pay and divide the same unto and equally between and amongst all and every the children and child of the said Rosetta Crouch and John Bryon." Maud Barnes Bryon was illegitimate, having been born before the marriage of her father and mother. There were also legitimate issue of the marriage. Maud Barnes Bryon was always treated as sister of the legitimate children, and was recognised by the testator as his niece. Bacon, V.-C., dealing with the case, says: "As to the general principle that 'children' can only mean legitimate children there can be no doubt, but I have asked Mr. Miller to shew me, and he has satisfied me that the testator knew of the circumstances of his nephew's family, and that he treated all the three persons named as children of his nephew. I take the testator's own words. He describes the legatee as the 'daughter' of his nephew. He afterwards by his codicil speaks of her emphatically as his 'great-niece,' and he speaks of another legatee who was legitimate as 'another daughter' of his nephew. I have not the slightest doubt that in the gifts of residue to (amongst others) 'all and every the children and child of' his nephew, he meant to include this person, whom he had described as the daughter of his nephew."

In *In re Horner, Eagleton v. Horner* (1887), 37 Ch. D. 695, a testator by his will directed his trustees to pay the income of a certain share in a trust fund "to my sister Charlotte, the wife of Thomas Horner," during her life, and after her death to pay and divide the share amongst all her children. Charlotte, to the testator's knowledge, never was the wife of Thomas Horner. Prior to the making of the will she had cohabited with Thomas Horner, and at the time of the making of the will had four illegitimate children by him, and had presumably passed the child-bearing age. The testator recognised her children as his nephews and nieces, and the question was whether the illegitimate children were entitled to the benefit of the bequest. In giving judgment Stirling, J., says (p. 700): "Charlotte never having had any legitimate children at all, the question arises whether these illegitimate children are now entitled to take the benefit of that bequest. The leading case upon the subject appears to be *Hill v. Crook*, *supra*. In that case the testator, in his will, spoke of his 'son-

Mulock, C.J.

1910

LOBB

v.

LOBB.

Mulock, C.J.

1910

LOBB

v.

LOBB.

in-law, John Crook,' and of his daughter 'Mary, the wife of the said John Crook.' . . . It appears that John Crook, who was spoken of as the testator's son-in-law, had formerly been married to another daughter of the testator, Sarah Ann, who died in 1851; and in the beginning of 1854 John Crook, with the full knowledge and assent of the testator, went through the ceremony of marriage with her sister Mary, the person referred to in the testator's will as 'my daughter Mary, the wife of the said John Crook.' Two children were born of that union in November, 1854, and in July, 1858, and were recognised by the testator as being the children of John and Mary Crook, and it was as to these that the question arose whether they were entitled to participate in the bequest. There were other children born afterwards of the same union, and it appears from the report that Mary Crook never had any legitimate children at all." Stirling, J., then quoted the words of Lord Cairns in dealing with this case (*Hill v. Crook*) in the House of Lords: "It appears to me that the terms 'husband' and 'wife,' 'father' and 'mother,' and 'children,' are all correlative terms. If a father knows that his daughter has children by a connection which he calls a 'marriage' with a man whom he calls her 'husband,' terming the daughter the 'wife' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person when he speaks of the 'children' of his daughter this meaning, that as he has termed his daughter and the man with whom she was living 'wife' and 'husband,' so also he means to term the offspring born of that so-called 'marriage' the children according to that nomenclature. That is all that your Lordships have to find. If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires. Treating the cases as establishing the proposition to which I have referred, I am of opinion that there is clearly, upon the face of this will, reading it simply with the knowledge which we are told to impute to the testator, a statement by him, in his own words that he meant to make a provision for the family already born of that union which he styles a 'marriage.'" Stirling, J., then proceeds: "Now, applying the same principle that Lord Cairns there lays down, what do we find on the face of this will? We find that

the testator described his sister Charlotte as 'the wife of Thomas Horner.' The testator knew well that his sister was not and could not be legally the wife of Thomas Horner. He therefore uses the term 'the wife' in that connection as designating a person who passed as or was reputed to be the wife of Thomas Horner. He did not use the word 'wife' in its strict legal meaning. Then, correlatively with that, comes the word 'children,' and, adopting the same mode of interpretation which Lord Cairns uses, if I find that a person is designated as a 'child' of a union which is not a marriage, but with respect to which the testator speaks as if it were a marriage, I must infer him to mean that included under the term 'children' are the offspring born of that connection. . . . It seems to me that applying the same principle, and taking, as Lord Cairns puts it, the testator's will as his dictionary, from which I am to find the meaning of the terms he has used, that is the principle upon which I am to construe the will, and that I ought so to hold."

In *In re Hall, Branston v. Weightman* (1887), 35 Ch. D. 551, Richard Weightman was an illegitimate son of Jane Hall by William Weightman, to whom she was afterwards married. Subsequent to the marriage she had other children. The testator Henry Hall was a brother of Jane Hall. In the earlier part of his will the testator appointed the said Richard Weightman and others executors, using these words: "I appoint my two nephews Richard Weightman," etc., executors. In disposing of his residuary estate he used these words: "I give the same to all the children of my brothers Edward Hall and Thomas Hall, and of my sister Jane Weightman," etc.; and the question was, whether, in the gift to the children of the testator's sister Jane Weightman, Richard Weightman, described as the testator's nephew in the early part of the will, was to be included. Kay, J., held that the mere description of Richard Weightman as the testator's nephew was not sufficient to include him amongst the children of Jane Weightman.

In *Smith v. Jobson* (1888), 59 L.T.R. 397, the testator devised "to my eldest daughter Elizabeth Jane all my estate at Plaintree Hill . . . in the parish of Elwick Hall . . . ; the whole of my property in the said parish of Elwick Hall I give and bequeath to my said eldest daughter Elizabeth Jane Jobson. . . .

Mulock, C.J.

1910

LOBB

v.

LOBB.

Mulock, C.J.

1910

LOBB

v.

LOBB.

Neither my sons nor eldest daughter shall have or enjoy a benefit from the lands" until a certain fund is raised. . . . And I particularly direct that, should any of my children die without having children of their own lawfully begotten, their share, whether land or money, shall be divided equally among my surviving children." Elizabeth Jane Jobson was illegitimate, and predeceased her father, leaving no issue. Held, per Kay, J., that the testator meant Elizabeth to be included in the word "children," and that the gift over of her share should take effect.

In *In re Brown, Brown v. Brown* (1889), 37 W.R. 472, the testatrix gave "to my niece Hannah Duten £50," and the residue of her estate "equally between all my nephews and neices." She knew that Hannah Duten was illegitimate, but recognised her as her niece. It was held that she was not entitled to share in the residue.

In *Re Brown, Walsh v. Browne* (1890), 62 L.T.R. 899, the testator had five children at the date of the will—three sons and two daughters. One of the daughters was illegitimate. He devised certain property to trustees "during the life of my daughter Mary Ann Martin," upon trust for her. He then made a devise upon trusts "in favour of my said daughter Adelaide . . . as should correspond in all respects with the preceding trusts in favour of my said daughter Mary Anne Martin Browne," and he bequeathed his residuary estate upon trust for "such of my children living at my decease." Stirling, J., followed the rule laid down by Cotton, L.J., in *Megson v. Hindle*, *supra*: "To take a case out of the common rule that only legitimate children can take under a gift to 'children,' there must be on the face of the will such a strong probability of the testator's intending to include illegitimate children, that a contrary intention cannot be imputed to him." Applying this rule, he held that the testator, throughout his will, referring to his illegitimate daughter as "my daughter," and, having regard to the scheme of his will, there was, on the face of the will, such a strong probability that the testator intended to include her as one of his children that she ought to share in the residue.

In *In re Du Bochet, Mansell v. Allen*, [1901] 2 Ch. 441, where illegitimate children claimed to be within the description of the objects of the testator's bounty, Joyce, J., at p. 447, quotes from



and applies the language of James, L.J., in *Crook v. Hill* (1871), L.R. 6 Ch. 311, 315, as follows: "The question, then, resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude, the children in question, as that a contrary intention cannot be supposed?"

In *In re Smilter, Bedford v. Hughes*, [1903] 1 Ch. 198, the testator devised lands to trustees to pay the income to his nephew George during his life, with gift over of the income under certain contingencies, for the maintenance of "my said nephew George Francis Smilter and his wife and issue, whether children or more remote . . . (including Samuel Smilter Revill hereinafter named)" during his nephew's life, and subject thereto the trustees were to hold the fund "upon trust for all and every the children and child of my said nephew George Francis Smilter living at my death . . . in equal shares, including amongst such children Samuel Smilter Revill, the illegitimate son of my said nephew." And, "if there shall be no child of my said nephew, including the same Samuel Smilter Revill, living at my death," then the fund to be held upon certain trusts for the benefit of eight nephews and nieces and their issue. The testator then gave certain lands to his trustees upon trust to pay the income to his niece Mary during her life, and, subject thereto, the trustees were to sell the lands and hold the proceeds in trust for her children, and, in default of children, for such of the seven other named nephews and nieces as were alive at her death and the issue of any who should die in her lifetime. The nephew George Francis Smilter died in her lifetime, leaving issue only one, namely, his illegitimate son Samuel Smilter Revill. It was held by Kekewich, J., that the recognition by the testator of Samuel Smilter Revill as the son of his nephew was sufficient to indicate the testator's intention

Mulock, C.J.

1910

LOBB

v.

LOBB.

Mulock, C.J.

1910

LOBB

v.

LOBB.

that Samuel, though illegitimate, for all the purposes of the will, should be treated as if the legitimate son of his father.

The tendency of the Court is to take a more liberal view in order to give effect to a testator's intention in favour of persons who are relations though not such in law: *In re Wood*, [1902] 2 Ch. 542.

Turning, then, to the will in question in order to interpret its language, the Court must put itself in the testator's position at the time of the making of the will, that is, must consider the existing circumstances. At that time the testator was living with Hannah Lobb as his wife and with his three infant children by her; and had no communication with his former family, so far as appears, having concealed from them any knowledge of his whereabouts or even of his existence. In the first part of his will he devises specific properties to "my son Charles Garfield Lobb," to "my son James Algie Lobb," and "to my daughter Annie Lobb." He then devises and bequeaths to "my dear wife Hannah Lobb the house premises and lots in my possession on Church street in the said city of St. Catharines . . . with all the household furniture, horses, waggons, and carriages, and all effects in and about the dwelling-house at the time of my decease, for and during the term of her life," and certain other property "to my said wife for and during her life, and after her death to go to and be divided between my children, share and share alike, or the survivors of them. . . . The homestead and furniture to be kept for the use and support of my wife and children during her lifetime, but no sale to be made until my youngest child becomes of age."

This is the first place where the testator uses the word "children." To whom did he there refer? The homestead and furniture are to be kept for the use and support "of my wife and children." This is a provision for the personal occupation of the homestead by his "wife and children." It is impossible to suppose that he intended here to include in the word "children" those six children long since over age and whom he deserted thirty years before. What children had he, then, in his mind when he provided for their living *en famille* with his "dear wife Hannah Lobb" in the homestead? Clearly her own children only. That he intended at least to include the three illegitimate children is manifest by the condition that the homestead is not to be sold

until his youngest child becomes of age. They were his only infant children, and, unless the testator included them in the class of "children," there were no children to whom that condition would apply.

For these reasons, I think that in this portion of his will the testator intended the word "children" to mean the three children of Hannah Lobb, and no others.

In the next paragraph of his will he gives his farm in Pelham "for the support and maintenance of my wife and children until the youngest child becomes of age" . . . then to be divided "one-third to my wife and the balance between my said children or the survivor of them, share and share alike."

It is obvious that the children here referred to are those referred to in the previous paragraph, namely, the three children of Hannah Lobb.

In the next paragraph the testator devises a block of three stores, the rents of which are to be applied for the support and maintenance of "my said wife and children until the youngest child becomes of age," and then directs an equal division between "my children." He had but three surviving children by Hannah Lobb, and he evidently contemplated each of these three children taking one of the three stores.

The rest of his property he disposed of in the same way, namely, for the support and maintenance "of my said wife and children," and directs his executors to invest all moneys coming to their hands "for the support and maintenance of my said wife and children until the youngest child becomes of age," when they are to divide the amount "between my said wife and children or the survivors of them."

I think that the word "children," wherever it appears in this will, means only those children of the testator who were to be entitled to occupy the homestead with Hannah Lobb, namely, the three illegitimate children, Charles, James, and Annie, to the exclusion of his legitimate children.

One clause of his will provides that "in the event of any of my children dying without issue before my youngest child becomes of age his or her share of my estate shall go to the survivors, share and share alike." "Youngest child" here referred to is evidently one of the "children" mentioned in the paragraph, and can only

Mulock, C.J.

---

1910

---

LOBB

v.

LOBB.

Mulock, C.J.

1910

LOBB

v.

LOBB.

apply to the children of Hannah Lobb. The testator had no other infant children, and his lawful wife Fanny Atwood was still alive and long past child-bearing age. Unless Hannah's children are included in the term "children" here used, the clause would be inoperative.

Taking into consideration, then, the language of the will itself and the surrounding circumstances above referred to at the time of its execution for the purpose of explaining the testator's language, there is, I think, so strong a probability of the testator's intention to include the three children of Hannah Lobb only in the word "children" wherever used in the testator's will, that a contrary intention cannot be supposed.

I, therefore, am of opinion that the three children, Charles Garfield Lobb, James Algie Lobb, and Annie Lobb, are the only children of the testator entitled to share in his residuary estate.

The action is, therefore, dismissed, but without costs.

---

[MAGEE, J.]

1910

SOMERVILLE V. ÆTNA LIFE INSURANCE CO. OF HARTFORD.

May 30.

*Life Insurance—Presumption of Death of Insured—Evidence—Proofs of Death—Insufficiency—Return of Premiums Paid after Supposed Death—Voluntary Payments.*

In an action upon two policies of insurance on the life of S., the plaintiff, his wife or widow, alleged that he died before the action was commenced and within a year after the 20th December, 1897, when he was last heard from; and she also claimed a return of the premiums paid by her upon the policies since the 20th December, 1898. Under each policy the insurance money was payable "within ninety days after due notice and proof of the death;" and by the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 80, insurance moneys are payable in sixty days after "reasonably sufficient proof." There was no direct evidence of the death, but the plaintiff rested upon the presumption arising from the fact that S. had not been heard of since the 20th December, 1897.

S. left his home in Toronto in November, 1897, and went to Chicago, with a view of seeking employment. During the six or seven weeks next after his departure he wrote three letters to his wife. In the last, dated the 20th December, 1897, written at Chicago, he stated that he was leaving there. Then all communications ceased, and since then nothing had been heard from or of him by the plaintiff or any of his family, who took no steps to trace him or ascertain whether he was living or not.

In December, 1906, the plaintiff first made claim for the insurance money, and forwarded to the defendants proofs of loss, which consisted of her own statutory declaration setting out the above facts, exhibiting copies of the three letters, and stating her belief that if he were living he would have continued to correspond with her. There was no proof of search or inquiry.



The action was begun on the 23rd March, 1907. After the action had begun the defendants advertised and made inquiries for S., but without success:—*Held*, upon the evidence given at the trial, and especially considering the efforts made by the defendants, that S. should be presumed to be dead before the 13th May, 1908; the probability of his sending intelligence of himself was not rebutted by anything in the evidence so as to prevent the presumption of his death arising.

But *held*, that the defendants had not received reasonably sufficient proof thereof before action, and upon that ground the action failed, and should be dismissed, but without prejudice to another action.

*Held*, as to the claim for return of the premiums, that no presumption arose as to that, and the plaintiff had not established that the death took place before the date of payment of any of the premiums accruing before action; and they were not paid negligently or under mistake, but voluntarily, with full knowledge of the doubt as to their being payable at all.

ACTION upon two policies of life insurance. The facts are stated in the judgment.

May 12, 1907. The action was tried before MAGEE, J., without a jury, at London.

*G. C. Gibbons*, K.C., and *G. S. Gibbons*, for the plaintiff.

*W. E. Middleton*, K.C., for the defendants.

May 30, 1910. MAGEE, J.:—The plaintiff, Mary J. Somerville, sues as the declared beneficiary of two policies of insurance issued by the defendants on the life of and effected by her husband, William J. Somerville, whom she alleges to have died before the action was commenced and within a year after the 20th December, 1897; and she also claims a return of premiums paid upon the policies since the 20th December, 1898.

The four children of the insured, who might claim if the plaintiff died before the insured, are all of age, and consented at the trial to be added as defendants.

One policy was for \$5,000, dated the 26th March, 1889, originally for only ten years, but renewable and renewed for ten years from the 26th March, 1899, the premium—\$105—being payable yearly in advance on the 26th March. This policy was made payable to William J. Somerville's executors, administrators, or assigns, but it is alleged, and not disputed, that the assured subsequently declared it to be for the benefit of his daughter, and that he did so before he made an assignment, about 1893 or 1894, to a trustee of his property for the benefit of his creditors. Then on the 20th October, 1896, he executed a document called an apportionment, whereby, in accordance with the provisions of R.S.O. 1887, ch. 136, sec. 6, and the several Acts in amendment thereof, "he

1910

SOMERVILLE  
v.  
ÆTNA  
LIFE  
INSURANCE  
CO. OF  
HARTFORD.

Magee, J.  
1910  
SOMERVILLE  
v.  
ÆTNA  
LIFE  
INSURANCE  
CO. OF  
HARTFORD.

did apportion and restrict the money which may become due under policy . . . in such manner that the whole amount thereof shall belong and become payable at my death to my wife Mary Jane Somerville if then living and if not then to my children who survive me."

The other policy—which cannot be found—was for \$1,000. By its terms the amount insured was payable to the wife of the assured. Under each policy the insurance money was payable "within ninety days after due notice and proof of the death" of the insured.

By the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 80, the money is payable in sixty days after "reasonably sufficient proof."

There is no direct evidence of the death, but the plaintiff rests upon the presumption arising from the fact that he has not been heard of since the 20th December, 1897.

To the claim upon the policies the defendants set up two defences: (1) that, under the circumstances and upon the evidence offered, the presumption of death does not arise; and (2) that the action is premature, as proper proofs of death had not been furnished before it was commenced. At the trial they also asked leave to plead: (3) that the action was not commenced within eighteen months after the death, in accordance with R.S.O. 1897, ch. 203, sec. 148, sub-sec. 2, amended by 3 Edw. VII. ch. 15, sec. 5, the policies making no stipulation as to the time within which any action should be brought.

To the claim for return of premiums the defendants say: (1) the death of the assured before the payment of any one or more of the premiums is not proved; (2) even if proved, the premiums are, under the circumstances, not repayable. At the trial they asked leave also to plead: (3) the Statute of Limitations.

Since December, 1897, the plaintiff, through her sons, has paid the premiums called for by the policies each year up till and including 1907. The premiums which would be payable thereafter, if the assured were living, have not been paid, a postponement of the trial having been granted to the defendants in November, 1907, upon the terms of their waiving payment of further premiums without prejudice to their claim upon the policies.

The action was commenced on the 23rd March, 1907.

It appears that William J. Somerville had been a retail merchant in Toronto for a good many years before 1893. About that year or 1894, he failed in business and made the assignment of his property for the benefit of his creditors. Thereafter he was employed successively in various capacities, but could get no permanent engagement in Toronto, and about November, 1897, he decided to see what he could do in the United States, and left Toronto for that purpose.

During the six or seven weeks next after his departure his wife received three letters from him—to which reference will be made later on—beside a post-card from Hamilton. In the last letter, dated the 20th December, 1897, written at Chicago, he stated that he was leaving there. Then all communications ceased. When he left Toronto his wife was unprovided for, and living in a rented house with his three sons and a daughter. His own age was forty-nine; the sons were then aged respectively twenty-three, twenty-one, and eleven years, and the daughter thirteen years. The needs of his wife and youngest children would furnish an inducement for him to help them with money and counsel. The letters which he wrote shew a desire up to the 20th December, 1897, to keep in touch with them and to assist them. The evidence shews that he was affectionate towards all the family, and not given to drinking or gambling. He also had two sisters living in Toronto, with whom he was on good terms, and another in Winnipeg, but they hardly expected any letters from him. It is said he had some bronchial or lung trouble, and had been warned by his physician against apoplexy, but he was apparently a robust, vigorous, healthy man. His wife says that he was very despondent and felt his position very keenly. He had with him a trunk and hand-satchel, but evidently could have very little money.

Since that letter of the 20th December, 1897, nothing has been heard from him, or of him, by the plaintiff or his family. Although they say that within six months or a year thereafter they concluded he was dead, they did not take any steps to trace him or ascertain whether he was living or not. His son was in Chicago in 1904, but made no inquiries at any of the addresses on the father's letters.

Probably from a feeling of pride and unwillingness on the part of the plaintiff to admit anything that would imply deser-

Magee, J.

1910

SOMERVILLE

v.

ÆTNA

LIFE

INSURANCE

Co. OF

HARTFORD.

Magee, J.  
1910  
SOMERVILLE  
v.  
ÆTNA  
LIFE  
INSURANCE  
CO. OF  
HARTFORD.

tion or neglect by her husband, she and the family, whenever any one happened to inquire about him, gave out that he was in Chicago, and spoke as if in communication with him, and in no way intimated to outsiders any belief in his death, or would give non-committal or evasive answers.

Since the action the company have advertised very widely for information in about sixty newspapers in the United States and Canada, offering a reward for information leading to his discovery, and received some thirty answers, and followed up supposed clues regarding him, and made inquiries in various quarters, but apparently without success. They called a witness, Mr. Stonham, whom I think a credible one, as to statements by Somerville leading to the inference that he might be expected to have written to another person, but, as that person was known to be in New York, and no evidence is forthcoming from that quarter, the suggestion falls to the ground. His intention, declared to Stonham, not to write to any but one person, can, I think, be only interpreted reasonably as meaning to only one outside of his family. The company have since been following up inquiries, and have recently (6th May, 1910) called another witness—Mr. McGill—a respectable man, who knew Somerville, and who in June, 1907, saw a man whom he then thought to be Somerville on the opposite side of a street in Chicago.

It appears by the application for insurance in 1889, that Somerville's brother went to the United States in 1881, and had not been heard of. From the sister's evidence at the trial it would seem that this brother had twice been absent a number of years without being heard from.

In December, 1906, the plaintiff first made claim for the insurance. The proofs of loss forwarded to the company were as follows:—

A statutory declaration by the plaintiff made on the 10th December, 1906, stating that she was the wife of the insured, and he had left his home in Toronto in or about November, 1897, and that she had received from him a letter of the 15th November, 1897, and subsequently two letters from Chicago, one dated the 8th December, 1897, as appeared by the post-mark, and the other the 20th December, 1897, copies of which letters were annexed, and that since that date she had not, nor had any member of



his family, received any intimation whatever from him, and she verily believed that if he had been living he would have continued to correspond with her, and she was satisfied that his only reason for not continuing the correspondence would be the fact that he had departed this life, and that when he departed from Canada he had three sons and one daughter, whose names were given.

The three letters, of which copies were annexed to this declaration, are such as would pass from an affectionate husband and father to his wife. In each he addresses his wife as "Dear Minnie," and sends his love to her and the children. In the first letter he says, "I enclose a small contribution for your expenses, but it is really more than I have to spare." In the second he says, "I am ashamed to write without sending you some money," and adds "I get so rattled when I think of you all and so nervous that it unfits me for work." In the third letter he writes, "I hasten to send a small help for Christmas, my bitter regret is that it is not more." The second letter gives as his address 3623 Lake avenue, Chicago, Ill., and in it he asks his wife to write him by return mail and tell him how they all are, but he adds: "And don't scold, for that only makes me afraid to write you at all. I know I am a failure, but I don't want to be told it." In the same letter he says: "I am as bad here as I was at home, only the prospects are a little better. Still I must be content to realise that I am played out in the dry goods trade and turn my attention to something else. . . . It is a wonderful place, but it is no use my staying here, for I cannot make more than pays my board at present."

In the last letter—a very short one—he says, "I am leaving here for some other place, for it is not possible for me to make an existence here." In the first letter he had said: "I will write again when I really get settled and in some situation, but there is no use my writing when I have no news to tell you; I hate to be sending excuses always."

These letters, though affectionate, indicate a dejected though not despondent state of mind, and recognise the necessity, but not the hopelessness, of trying some other business elsewhere, and shew a dislike of writing unless successful. It is noticeable that when he writes of leaving Niagara Falls and Chicago, he

Magee, J.

1910

SOMERVILLE

v.

ÆTNA

LIFE

INSURANCE

Co. OF

HARTFORD.

Magee, J.  
1910  
SOMERVILLE  
v.  
ÆTNA  
LIFE  
INSURANCE  
CO. OF  
HARTFORD.

gives no indication where he is going to, nor what he has in mind, nor how he is to be communicated with. Although his letter of the 8th December invited his wife to write him and gave his address, and she says she did write, his letter of the 20th December makes no reference to receipt of any word from her. If he had not got any reply, that fact, coupled with his request not to scold, his reference to his nervous condition, his dislike of writing when not successful, and his giving no indication of his future movements, would prepare one for absence of correspondence for some time at least. The plaintiff says her reply to his last letter was returned from the dead letter office unopened.

These letters and the wife's declaration were the only formal proofs of death upon which the defendant company were asked to pay. There was not laid before them any proof of search or inquiry made for him. Indeed, none had been made. He had given the address in Chicago which I have referred to. Both his letters from that city were written on paper having the letter-heading of "Werner Company, Chicago." The two envelopes were from another establishment, having printed on them "The Chicago Record Educational Department." It is true that the defendants were not made aware of the printed letter-headings or the printing on the envelopes, and therefore would have no reason to expect or then complain of want of inquiry at those addresses; but the absence of inquiry at 3623 Lake avenue would be patent. The failure to inform the company of inquiry was not cured at the trial, for it was shewn that there was in fact no inquiry at any of the places indicated, although the plaintiff's son was in Chicago on other business for some time. The family do not appear to have made any attempt to trace him or asked any one about him for five or six years before the trial, and even before that only spoke of him when any of their friends spoke of him.

In the company's letter to the plaintiff's solicitors of the 20th December, 1906, objection is taken to the sufficiency of the proof of death, and a blank form was enclosed as "shewing how affidavits could be made giving therein the specific information mentioned in such form, and same should be forwarded to us as soon as possible." And on the 22nd December, 1906, the Toronto agents of the company wrote the plaintiff's solicitors "trusting that you will be able to get another affidavit made embracing information on the several points thus brought to your notice."

On the 24th December, 1906, the plaintiff's solicitors wrote the company: "We have given you in the declaration of Mrs. Somerville all the particulars we have . . . and we do intend unless we hear from you within a reasonable time to issue writ. Mr. Somerville has not been advertised for, and the declaration we sent you gives all the information which it is in our power to furnish."

In reply on the 29th December, 1906, the company wrote: ". . . We agreed to pay within ninety days after receipt of proofs of the death of the insured. . . . We have not been furnished with any such proofs, and it now appears that you intend to do nothing whatever towards locating him or giving us any information which might enable us to do so. Your position in the matter does not appear to us reasonable, and we think it no more than right that you or your clients should give us all the information in your or their possession relating to the disappearance of Mr. Somerville. You certainly can give us more information than you have done, and there appears no good reason, so far as we can now see, why the questions outlined in the form sent you in our last letter cannot be answered and forwarded to us. You say that Mr. Somerville has not been advertised for. May we ask if the family does not want any effort made to locate him?" On the 7th January, 1907, the plaintiff's solicitors answered that they had not the slightest objection to the company advertising, and would be willing to pay out of the amount coming on the policies, and that their clients were quite satisfied that if Mr. Somerville were alive he would have continued to correspond with his family, and the character of his last letter was pretty good evidence of that.

After the lapse of ninety days the writ followed on the 23rd March, 1907. The form which the company sent as suggesting the sort of information is not put in evidence, but if, as it probably is, like that which had been previously furnished to the sons, it does not appear to have asked anything unreasonable.

That form was headed, "Questions relative to disappearance of William J. Somerville," etc.:—

"1st. On what date did he last leave Toronto?

"2nd. Was he afterwards heard of, or from? If so, when and how?

Magee, J.  
1910  
SOMERVILLE  
v.  
ÆTNA  
LIFE  
INSURANCE  
Co. OF  
HARTFORD.

Magee, J.  
1910  
SOMERVILLE  
v.  
ÆTNA  
LIFE  
INSURANCE  
CO. OF  
HARTFORD.

"3rd. What business was he engaged in at the time of leaving, and how long had he been in it?

"4th. Was business apparently going well with him, or was there business difficulty impending?

"5th. Did the business go on successfully after he left it, or was there a winding-up at a loss?

"6th. Was there any domestic disagreement about that time which might have led to a rash act, or was he in ill health in any way?

"7th. What is your own opinion, from all available information, as to why he failed to return home promptly, and why no word from or about him has been received?

"8th. What efforts were made at the time or since to trace his movements or prove his death?

"9th. Give the names and ages of all 'preferred beneficiaries,' now living, which means his mother, wife, children, and grandchildren."

Of these questions the first, seventh, and last were practically answered in the plaintiff's declaration. The second, a very important question, was not answered in that declaration, which only stated that neither she nor any of his family had received any intimation from him, and, if living, he would have corresponded with her, and his death would be the only reason for his not doing so. The third, fourth, fifth, and sixth were natural and reasonable questions, and could readily have been answered, though it may be said those answers would not have changed the fact that he was not heard of. But as to the eighth question the company had no information whatever beyond the statement that he had not been advertised for. As it would have had to be answered in the negative, it was, no doubt, considered that an answer would give no further information of value to the company.

Previous to the correspondence with the solicitors, the plaintiff's son had had some communication with the company's agents as to the company purchasing the policies, and the company had in October, 1906, furnished the list of questions to be answered. The son says he did not wish to answer them, although he does not consider them unreasonable and could have answered all, but, being in Detroit, could not attend to it.

As to whether, on the evidence here, the plaintiff's husband



should be presumed to be dead, the answer, I think, must be in the affirmative, though I cannot help having some lingering doubt of the fact. Were it not for the efforts made by the defendants themselves, since action, by advertising and following up many answers thereto, I should not have considered the evidence sufficient. But, if the plaintiff were to wait for ten years more, what more could be done by her than has been done by the defendants? His own family and relatives have not heard from him. He corresponded with his wife frequently during the last six weeks of his known life. His letters give no indication of an intention to drop that correspondence, nor of any lessening of interest in his family. Nor do they suggest his going to any place from which it might be difficult to communicate, nor any probability of his changing his name or any reason for doing so. Though apparently recognising the inability to succeed at his own trade, or in Chicago, he does not appear hopeless of success in some other business and place.

The probability of his sending intelligence of himself is not rebutted by anything in the evidence so as to prevent the presumption of his death arising.

It is true that it does not yet appear that any inquiries have been made at the address on Lake avenue at which he directed his wife to write him, and to which she did write two letters, only one of which was returned; nor at the place of business of the Werner Company or the Chicago Record, where it might be presumed he had made acquaintance with some one. But, as against these defendants, who obtained a postponement on the ground of their extensive inquiries, it must, I think, be fairly taken that they either exhausted all possible information there or that they were satisfied none was to be obtained.

Although one may have many doubts as to his death, and may recall instances (such as in *McArthur v. Eagleson* (1878), 43 U.C.R. 406) of people turning up after long absence, and may recognise how unsatisfactory it is to an insurance company to have to pay merely on evidence of disappearance, yet, on the other hand, considering the *bona fides* of the insurance and the absence of any reason for suggesting an intentional fraud upon the company, I do not know of any principle in any of the authorities on which I can refuse to give effect to the fact that he has

Magee, J.

1910

SOMERVILLE

v.

ÆTNA  
LIFEINSURANCE  
Co. OF  
HARTFORD.

Magee, J.  
1910  
SOMERVILLE  
v.  
ÆTNA  
LIFE  
INSURANCE  
Co. OF  
HARTFORD.

not been and cannot be traced, and to declare that the presumption of his death should take effect. The plaintiff and his family have taken singularly little interest in his disappearance, considering that they allege such early belief in his death. Chicago is practically as easy of communication as one of our own cities, and the police and other authorities are as ready to obtain and give information. As a rule, hotels, hospitals, undertakers, fraternal and charitable societies, coroners, and police, are most ready and willing to telegraph or write to the friends of any strangers who may die. Whatever misgivings one may have arise more from the course taken by the family than from anything connected with his own actions.

There are, no doubt, cases where the fact of not being heard from for even longer than seven years has not been considered sufficient. In *Watson v. England* (1844), 14 Sim. 28, thirty years' absence was not considered sufficient, for the circumstances made it probable that the girl who was going abroad would not be heard from again by her relations, and Shadwell, V.-C., said: "The old law relating to the presumption of death, is daily becoming more and more untenable. For, owing to the facility which travelling by steam affords, a person may now be transported, in a very short space of time, from this country to the back woods of America, or to some other remote region, where he may be never heard of again." In *Bowden v. Henderson* (1854), 2 Sm. & Giff. 360, the circumstances also rebutted the probability of any communication. In a number of American cases seven years' absence of tidings was held not sufficient. In *Hitz v. Ahlgren* (1897), 170 Ill. 60, the last had been in 1872. In *Dunn v. Travis* (1900), 56 N.Y. App. Div. 317, the fact of a youth of nineteen who had been in New Zealand in 1855, not having been heard from, was held insufficient without inquiries in New Zealand; and in *In re Ulrich* (1880), 14 Phila. 243, a man not heard from by relatives since 1860 and believed to have gone to California was not presumed to be dead, there having been no attempt to inquire or advertise in California. In *Re Hopfensack and New York Board of Education* (1903), 173 N.Y. 321, the Court of Appeals, in an instructive judgment on application for payment out of Court, where the party entitled had not been heard of for over seven years, said the applicants should have exhausted all the evidence

they were capable of producing, and it was the duty of the Court to proceed with care and insist upon there being produced all the evidence therein upon the subject.

But in the present case the wide advertising and inquiries by the defendants have, I think, cured any absence thereof by the plaintiff, and the weakness, if not absence, of any probability that the insured would cease to communicate with his family differentiates this case from those in which the presumption was held not to arise.

As regards the evidence of McGill, I accept his statements as honest. I do not think it can be taken as establishing that the man he saw in June, 1907, was the plaintiff's husband. It certainly is not so strong as the evidence in *Prudential Assurance Co. v. Edmonds* (1877), 2 App. Cas. 487.

Upon the other branch of the case, the sufficiency of the proof tendered to the company before action, my finding must be against the plaintiff. I have already pointed out the meagreness of it, and the absence of the reasonable information asked by the company. I do not consider that it was proof as required by the policy, or reasonably sufficient proof as required by the statute. It would have been consistent with it that the plaintiff or her family might have heard in various satisfactory ways of his existence without direct intimation from himself. See *Doyle v. City of Glasgow Life Assurance* (1884), 53 L.J.N.S. Ch. 527.

As to the claim for return of the premiums, that would involve fixing the time of the death. No presumption arises as to that. It is a question of fact to be established by evidence or inference from evidence. Whether the death is to be supposed to occur at or near the beginning or the end of the period of silence, must in each case depend on the circumstances. As was said in *In re Phené's Trusts* (1870), L.R. 5 Ch. 139, the last day is the most improbable. If the proof of death depended solely on failure to communicate, the date might be assumed to be somewhat early, though not at the very beginning of the seven years; but here the proof is largely the failure of any result from the defendants' advertising and inquiry, when coupled with the previous silence. I do not think the plaintiff has established that the death took place before the date of payment of any of the premiums accruing before action, even if that would entitle her to recover any of

Magee, J.

1910

SOMERVILLE

v.

ÆTNA

LIFE

INSURANCE

CO. OF

HARTFORD.

Magee, J.  
1910  
SOMERVILLE  
v.  
ÆTNA  
LIFE  
INSURANCE  
CO. OF  
HARTFORD.

them back. They were not paid negligently or under mistake, but voluntarily, with full knowledge of the doubt as to their being payable at all.

I allow the defendants' application to plead the Statute of Limitations to the claim for return of premiums, although it is on my findings unnecessary.

I do not allow the application to plead to the action on the policies that the death did not occur within eighteen months. The plea would be an invalid one, the date of death not being found.

The judgment will declare that William J. Somerville should be and is legally presumed to be dead before the 13th May, 1908, but that the defendant company had not received reasonably sufficient proof thereof before action, and the action will be dismissed with costs, but without prejudice to another action.

If the defendants desire, before judgment is entered, to make an application in Chambers for a declaration of the presumption of death under sec. 148, sub-sec. 3, of the Ontario Insurance Act, as amended by 7 Edw. VII. ch. 36, sec. 3, so as to obtain the protection of that enactment, it may be done.

---



## [DIVISIONAL COURT.]

RE MOLSON, WARD v. STEVENSON.

D. C.

1910

Feb.  
May 17.*Will—Probate—Testamentary Writings of Different Dates Standing together.*

The testatrix, who died in 1908, left two testamentary writings, both properly executed as wills, one dated in 1875 and the other in 1879. The two documents were found, after her death, folded together. The two were in the same words down to and including the fourth paragraph of each. The fifth paragraph of each was the same, except that in the later document additional provision was made for paying off a mortgage on a certain cottage. The sixth paragraph of the earlier document provided for the division of the surplus of the estate (except the articles thereafter specifically bequeathed) among three nieces of the testatrix. This paragraph was entirely omitted from the later document; and the later one did not contain any direction as to or disposition of the residue of the estate, nor any revocatory clause. The sixth and seventh paragraphs of the later document disposed of the cottage spoken of; and the subsequent paragraphs disposed of various articles of personal property, some to the same persons to whom they were given by the earlier document, while in some cases the destination was changed. No pecuniary legacy was given by the second document. The same executors were appointed in both. The later one was called "my last will." If the later one alone were admitted to probate, there would be an intestacy as to part of the estate, as there was a considerable residue, and no residuary gift:—

*Held*, that the two documents together constituted the last will of the testator, and letters of administration with both documents annexed were properly granted.

*In the Estate of Bryan*, [1907] P. 125, 76 L.J.N.S.P. 30, distinguished.

Judgment of the Surrogate Court of Northumberland and Durham affirmed.

APPEAL by the defendants Horatio Stevenson and Henry J. Stevenson from the judgment of the Surrogate Court of the United Counties of Northumberland and Durham finding that two testamentary writings, dated respectively the 17th December, 1875, and the 16th October, 1879, together contained the last will and testament of Sophia Molson, who died on the 23rd December, 1908, and directing that letters of administration with the two wills annexed should be issued to Henry Alfred Ward, the plaintiff.

The first will appointed executors, and, having a residuary clause, disposed of the whole estate. The second will appointed the same executors, was called "my last will," did not in any way refer to the former document, had no revoking clause, no residuary clause, and did not dispose of the whole estate actually existing at the date of the decease, a large sum having accumulated since the date of the second document, as to which sum, if the second document alone was admitted to probate, there would have been an intestacy.

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.

Before the Surrogate Court certain affidavits were filed and provisionally admitted in evidence in case the Court should find doubt on the interpretation of the documents.

The executors of both wills renounced, and all persons interested consented that Henry Alfred Ward should be appointed administrator with the will annexed, and he therefore applied for letters of administration. The question for the Court being, what was to be annexed, the plaintiff was in the position of a person interpleading, and the contestants were two groups of defendants, those asserting the revocation of the first paper, on the one side, and those contending that the two documents together constituted the will, on the other side.

The facts are more fully stated in the judgment of the Judge of the Surrogate Court.

February 28. BENSON, Surr. Ct. J.:—The testatrix, who was a widow, died on the 23rd December, 1908.

She made two wills, the second one being executed in duplicate, all of which were found after her death, folded together in a tin box, with some title deeds and other papers of the deceased.

The first will is dated the 17th December, 1875, and was drawn by Mr. Henry J. Scott, then a student-at-law. The second will is dated the 16th October, 1879, and was drawn by Mr. William V. Stevenson, a nephew of the testatrix, then in his twentieth year, and a student attending a public school.

The two wills are in the same words down to and including the fourth paragraph of each.

The fifth paragraph of each is the same, except that in the later will additional provision is made for paying off a mortgage on a brick cottage and lot.

The sixth paragraph of the first will provides for the division of the surplus of the estate (except the articles thereafter specifically bequeathed) among three nieces of the testatrix. This paragraph is entirely omitted from the second will; and the second will does not contain any direction as to or disposition of the residue of the estate, nor any revocatory clause.

The sixth and seventh paragraphs of the second will dispose of the brick cottage and lot, and provide for its occupation during the lifetime of the father of the devisee. The subsequent para-

graphs of this second will dispose of various articles of personal property, including household furniture, jewellery, silver and plated ware, books and other effects; some of these bequests are to the same persons to whom they were given by the first will, while in some cases the destination of the articles is changed.

There is no pecuniary legacy given by the second will.

The due execution of both wills is admitted by all parties interested in the estate who have appeared to the citation issued, and all these parties desire that whatever grant of administration is made shall be to the applicant, Mr. Henry A. Ward, in whose favour all the executors have renounced probate.

The application is for a grant of letters of administration with both the testamentary documents annexed; this is opposed by two of the brothers and by the sisters of the testatrix, who assert that the first will was revoked by the second, and ask that administration should be granted with only the will of the 16th October, 1879, annexed. The application is supported by the nieces to whom the residue is given by the first will. Others interested submit their rights to the Court.

The question, therefore, which I have to decide, is whether administration should be granted with both testamentary documents annexed, as together forming the last will and testament of the testatrix, or whether the last will revoked the earlier one, and administration should be granted with the last will alone annexed.

It is well settled that the statement in the later testamentary document that it is the last will and testament of the testatrix, has of itself no revocatory force or effect.

In *Birks v. Birks* (1865), 34 L.J.N.S.P. 90, Sir J. P. Wilde, at p. 92, says: "It is said that the words, 'This is the last will and testament,' have sometimes been relied on as shewing that the testator intended all previous instruments to be revoked; but the judgment of the Privy Council (*Cutto v. Gilbert* (1854), 9 Moo. P.C. 131) has settled that point, and it is obvious that a man might very well sign a paper in which that language is used, without intending to revoke all previous instruments."

And in *Simpson v. Foxon*, [1907] P. 54, 76 L.J.N.S.P. 7, in which the second testamentary document was stated to be "the last and only will," Sir Gorell Barnes, President, says, at p. 8 of

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.  
Benson, Surr. Ct. J.

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.  
Benson, Surr. Ct. J.

the Law Journal report: "The result of a chain of authority is that the words 'the last will' would not revoke a former will if not inconsistent with it; the last will might even tend to confirm what had gone before."

The cases are numerous in which these words, "This is the last will and testament," in a later testamentary paper, have not been treated as revocatory of a prior testamentary paper. (Reference to *Lemage v. Goodban* (1865), L.R. 1 P. & D. 57, 35 L.J.N.S.P. 28; *In the Goods of Petchell* (1874), L.R. 3 P. & D. 153; *Cadell v. Wilcocks*, [1898] P. 21.)

The principle to be applied to cases such as this, where there are two or more duly executed testamentary instruments to be dealt with, is laid down in Williams on Executors, 7th ed., p. 162, 9th ed., p. 138, and 10th ed., pp. 119, 120, as follows: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that 'no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a testamentary paper . . . be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent."

In *Lemage v. Goodban*, L.R. 1 P. & D. 57, Sir J. P. Wilde cites with approval this statement of the law, and says at p. 62: "This passage truly represents the result of the authorities." He then proceeds: "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers, will no more necessarily vitiate any of them than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the Court, before concluding



that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered, relates to the disposition of the testator's property, and not to the form of his will. What disposition did he intend?—not which, or what number of, papers did he desire or expect to be admitted to probate,—is the true question. And so this Court has been in the habit of admitting to probate, such, and as many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

Referring to this case in *In the Goods of Petchell*, L.R. 3 P. & D. 153, at p. 156, Sir J. Hannen says: "In that case there were two instruments, both purporting to be the last will and testament of the deceased. In each will there was a residuary clause, but in the latter it was perfectly unintelligible, and it was impossible to give effect to it. The Court held it was justified in granting probate of both instruments, because the earlier contained a residuary clause which it was thought it was not the intention of the testator to revoke. That precedent I am entitled to act upon in this case."

In reference to the above quotation from Williams on Executors, in *Townsend v. Moore*, in the Court of Appeal, [1905] P. 66, Lord Justice Vaughan Williams, at p. 77, says: "In dealing with the authorities I will first read a passage from Williams on Executors, 7th ed., vol. 1, p. 162, 9th ed., vol. 1, p. 138, because that passage in its entirety and in particular the final clause of it has been most emphatically and judicially affirmed." In that case of *Townsend v. Moore*, Vaughan Williams, L.J., lays down some general principles which are applicable to the case in hand. At p. 77 he says: "*Primâ facie* every document purporting to be testamentary, and signed and witnessed in accordance with the provisions of the Wills Act, ought to be admitted to probate. When, however, there are more testamentary documents than one, the presumptive admissibility to probate of the documents

D. C.

1910

RE  
MOLSON,  
WARD  
v.  
STEVENSON.

Benson, Surr. Ct. J.

D. C.  
1910

RE  
MOLSON,  
WARD

v.

STEVENSON.

Benson, Surr. Ct. J.

may be displaced, because it may be that there is a sequence in the dates of the execution of the documents, which, coupled with the words of the later document, or the inference to be drawn from those words, leads to the conclusion that the later document was intended as a revocation of the earlier, or, it may be, intended to revoke partially or to modify the earlier document, or, lastly, it may be that, apart from any question of revocation, the Court has to deal with documents which are proved to have been executed on the same date and occasion, or which are undated, and as to which it is impossible to affirm that the one has any priority in time of execution over the other. In this last case, if the documents are so inconsistent that they cannot stand together, in my opinion probate becomes impossible, because the presumption of admissibility to probate of a testamentary document executed in accordance with the Wills Act is displaced." At p. 80, Lord Justice Vaughan Williams refers to *Jenner v. Finch* (1879), 5 P.D. 106, and says: "The importance of that case is that it shews what is the question which the Court ought to ask itself when there are two testamentary documents as in the present case. Sir James Hannen arrived at the conclusion that you must not, in the first instance, ask how many testamentary documents did the testatrix intend to constitute her will, but that in the case of documents prior and subsequent in date you must first look at the later document and see what are its provisions, and, having construed its words, ask yourself the question, aye or no, did the testator intend that the later document should be a revocation of the first, or did he intend that the two should be read together?" Again, on the same page, he says: "I think the basis of this principle (which, indeed, is plainly laid down in the first case which I cited (*Lemage v. Goodban*, L.R. 1 P. & D. 57) by Sir James Wilde, that when there is, as between two documents properly executed in accordance with the Wills Act, the question to be solved how far the one affects the other, the Probate Court must to that extent and for this purpose act as a Court of construction) is this—that if a document purports to be testamentary, and it is executed in accordance with the provisions of the Wills Act, *primâ facie* that document ought to be admitted to probate. In order to reject such a document you have to displace that presumption," etc. Again, on p. 81, he says: "And, though it is a principle which *primâ*

*facie* one would be reluctant to apply, I think the authorities shew that, when there are two properly executed testamentary instruments and it is contended that both ought to be admitted to probate, the principle applied by the Court has been that in construing the documents it will endeavour so to read the words as to support the admissibility of both documents to probate, even though, for the purpose of arriving at that conclusion, it may have to reject a construction of the later instrument or of the two instruments, as the case may be, which is not only possible, but may be one which the Court would feel bound to adopt if it was not overmastered by the consideration that it ought not readily to conclude that the testator intended to revoke a properly executed testamentary document in the absence of express words of revocation, and when the inference of revocation can arise only from the construction of the testamentary instrument in question." At p. 84, Romer, L.J., referring to the two testamentary documents sought to be admitted to probate, says: "Both documents, then, should be admitted to probate, and the effect of the two together must be determined by a consideration of their contents, and of the circumstances under which they were executed. So far as they can stand together effect should be given to them both. The cases shew how far Courts of construction have gone in the way of reconciling documents which they felt it their duty to endeavour to reconcile, and how they have struggled, if I may use the expression, to reconcile dispositions which on the face of them might at first sight appear to be somewhat irreconcilable."

*Hellier v. Hellier* (1884), 9 P.D. 237, was a case of two wills. The testator made a will in 1864, by which he left all his estate to his wife and made her sole executrix. In 1877 he executed another will, which made in part a different disposition of his property. There was no evidence of a revocatory clause in the second will, or of a change of executrix. The second will was lost and could not be found. Butt, J., at p. 239, says: "I am of opinion that in the absence of any revocatory clause in the second will or a change of executrix, the second will, which is lost, cannot, unless the dispositions of the first will were wholly altered by it, be held to have revoked the first, and in my opinion there was no such alteration of the disposition of the property. This conclusion seems to me consistent with the interpretation that has already

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.  
Benson, Surr. Ct. J.

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.  
Benson, Surr. Ct. J.

been put upon the judgment of the Privy Council in *Cutto v. Gilbert*, 9 Moo. P.C. 131, by Lord Penzance (then Sir J. Wilde) in the case of *Lemage v. Goodban*, L.R. 1 P. & D. 57." He then refers with approval to the quotation in the judgment of Sir J. Wilde from Williams on Executors (*supra*), and adds: "I take that to mean that if the dispositions are only partly altered, there is no entire revocation of the preceding will by them. This being Sir J. Wilde's view—with which I entirely agree—of the results of *Cutto v. Gilbert* and the other authorities, I hold that the second will in this case, with the contents, so far as we know them, did not revoke the first. . . . I am, therefore, of opinion that the will of 1864 was not revoked by the will of 1877, even though that later will may have been destroyed *animo revocandi*, and that I must admit the will propounded and pronounce for it, the defendants to have their costs out of the estate."

The head-note to the case of *In the Goods of Petchell*, as reported in L.R. 3 P. & D. 153, is as follows: "The deceased executed a will, in which, after disposing in legacies of a small part of her property, she left the rest to her daughter absolutely, and she appointed her executrix. She subsequently executed another instrument, which purported to be her last will and testament, but had no revocatory clause. By this she gave the whole of her property to her daughter for life, and made her whole and sole executrix. On the death of the daughter she gave legacies to a larger amount than in the first will, but did not dispose of the residue: *Held*, that the two instruments ought to be admitted to probate as together containing the will of the deceased." Sir J. Hannen, after stating the facts substantially as in the head-note, and the law as laid down in Williams on Executors, and referring to the case of *Lemage v. Goodban*, *supra*, says, at p. 157: "Acting on the decision to which I have referred, I have come to the conclusion that I am justified in holding that the testatrix intended that the residuary bequest which is found in the first will, but not in the later, should form part of her will, and that by varying in the second instrument the dispositions of the former she did not intend to revoke the residuary clause contained in the earlier paper. The two instruments, together with the codicil to the first, will be admitted to probate, as together containing the will of the deceased."



*Geaves v. Price* (1863), 32 L.J.N.S.P. 113, was a case of two wills which were both admitted to probate. By his first will, dated the 3rd January, 1853, the testator directed all his just debts and funeral and testamentary expenses to be paid, and subject thereto gave all his real and personal estate to J. G. P. absolutely, and appointed J. G. P. sole executor, revoking all former wills and declaring this to be his last will. By his second will, dated the 12th March, 1862, he directed his debts and funeral expenses to be paid, and devised to W. G. two dwelling-houses, and appointed W. G. sole executor, declaring this to be his last will and testament. This second will contained no revocatory clause. Sir C. Cresswell, in giving judgment, said: "I think that the two papers are not inconsistent, and that therefore both are entitled to probate as together containing the will of the deceased. I have had some doubt whether probate should be granted to both executors, but I think the meaning of the testator is too doubtful to justify me in excluding either. They may, therefore, take probate jointly. I think the costs of both parties should come out of the estate."

In *Richards v. The Queen's Proctor* (1854), 18 Jur. 540, the testatrix left two testamentary papers, neither termed a last will, but with different executors. There was no revoking clause in the latter paper, nor any disposition of the residue. Two of the three residuary legatees under the first paper died before the date of the second. It was held that the intention of the testatrix was that both should operate, and that both were entitled to probate.

In *Chichester v. Quatrefages*, [1895] P. 186, the first codicil to the will was held to be revoked by the second codicil. The second codicil referred to the will, but not to the first codicil, and, except that it contained dispositions consequent upon the death of the wife of the testator, and that one legacy was increased after it had been engrossed, was a repetition of the first codicil. On the death of the wife, the testator altered a draft of the first codicil, so as to make a second, and the document so altered became the second codicil. It was held that the second codicil was intended to be substituted for the first codicil, and could alone be admitted to probate with the will.

*In the Estate of Bryan*, [1907] P. 125, is a case which presents

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.  
Benson Sur. Ct. J.

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.  
Benson, Surr. Ct. J.

many features similar to the case in hand, and was much relied on by the parties contending here that only the later will should be given effect to. There "by an earlier will executed in 1864 with a codicil thereto executed in 1865, the deceased had left all her property to two persons (the same two as she subsequently named as executors under her last will), subject to the payment of debts and funeral and testamentary expenses and of certain specific legacies, in trust for her sister Ellen Amelia Bryan for her life, and, after the sister's death, for her niece Catherine Mary Orton for her life, and thereafter for the children of her said niece. The last will was in substance a repetition of the former will and codicil, but the trusts in favour of the niece and the niece's children were omitted and a specific legacy to the niece was cut down, while a legacy to another member of the Orton family was omitted. A legacy of £500 to a person not previously named was included in the last will, but there was no express clause of revocation and no gift of residue." Sir Gorell Barnes there, in referring to certain features in the documents themselves, says, at p. 128: "The will of 1867 is expressed to be 'the last will,' and, although this is by no means conclusive, it is a circumstance which cannot be overlooked." In the cases of *Birks v. Birks*, *Lemage v. Goodban*, *In the Goods of Petchell*, and *Cadell v. Wilcocks*, above referred to, this is not considered of any importance. He also refers to the provision in each will for the payment of debts and funeral and testamentary expenses, and says: "It cannot have been the intention of the testatrix that the trustees were to pay the debts and funeral and testamentary expenses twice over." He also mentions that the executors were the same. These provisions as to payment of debts, etc., were found in both wills in *In the Goods of Petchell* and *Geaves v. Price*; and in *Lemage v. Goodban* and *In the Goods of Petchell* the executor was the same person; and these provisions were not treated as intending a revocation of the earlier instrument. And in *Lemage v. Goodban*, at p. 62, Sir J. P. Wilde says that redundancy and repetition will not necessarily vitiate any of the several independent papers.

The distinctive feature of the case of *In the Estate of Bryan*, and that which most plainly indicated the intention of the testatrix that the residue should not go as directed by the first will, was that the second will dealt with the residuary clause in the

first will so far as the life interest therein of her sister was concerned, and stopped there, omitting its provisions giving the residue ultimately to her niece. This seems to indicate that she had the disposition of the residue before her mind, and deliberately intended that its destination should be changed. The extrinsic evidence by affidavit, which was admitted and read *quantum valeat*, but which it was thought unnecessary to consider, plainly shewed this. Sir Gorell Barnes was of opinion that on the face of the documents themselves the last will was a revocation of the earlier documents.

It seems to me that there is a clear distinction between this case of *In the Estate of Bryan* and the one I am dealing with.

This *Bryan* case is more fully reported in the Law Journal Reports, 76 L.J.N.S.P. 30, and the affidavit evidence is there stated to have shewn that instructions were given by the testatrix for her second will, leaving no doubt of her intention to deprive the residuary legatees of the benefit they took under the first will; but by some misapprehension the matter had miscarried.

In the case before me I do not find in the later instrument anything to indicate that the testatrix intended to disturb the residuary clause in the earlier paper, further than to make specific bequests of some articles which would otherwise have formed part of the residue, leaving the rest of the residue to go as directed. This might well have been accomplished by a codicil, but, as said by Sir J. P. Wilde in *Lemage v. Goodban*, "the 'intention' to be sought and discovered, relates to the disposition of the testator's property, and not to the form of his will."

(Reference, on the question of "intention," also to *Wilbraham v. Scarisbrick* (1847), 1 H.L.C. 167, and to *Methuen v. Methuen* (1817), 2 Phillim. 416.)

I cannot say that the two documents now before me are "incapable of standing together."

I cannot better express the decision at which I have arrived than by using the language of Sir J. Hannen, at the conclusion of his judgment in *In the Goods of Petchell*, L.R. 3 P. & D. 153, 157: "Acting on the decision to which I have referred, I have come to the conclusion that I am justified in holding that the testatrix intended that the residuary bequest which is found in

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.  
Benson, Surr. Ct. J.

D. C.

1910

RE

MOLSON,  
WARD

v.

STEVENSON.

Benson, Surr. Ct. J

the first will, but not in the later, should form part of her will, and that by varying in the second instrument the dispositions of the former she did not intend to revoke the residuary clause contained in the earlier paper."

I therefore direct that letters of administration, with the two instruments here propounded annexed, as containing together the will of the deceased, be issued to the applicant.

The latest case I have seen noted on this subject is *Reeves v. Reeves*, [1909] 2 I.R. 521, per Kenny, J.: "Where a subsequent testamentary paper is only partly inconsistent with one of earlier date, the earlier instrument is only revoked as to those parts where it is inconsistent, and both papers are admitted to probate."

An application was made on behalf of those contending for the admission of both wills to be allowed to present some extrinsic evidence as to the manner in which the testatrix had preserved both papers; but I did not think the occasion had arisen for having recourse to extrinsic evidence, and if it had I do not think the evidence offered was admissible. (Reference to *Jenner v. Finch*, 5 P.D. 106; *In the Goods of Nickalls* (1865), 34 L.J.N.S.P. 103; *In the Goods of Bryan*, [1907] P. 125, 76 L.J.N.S.P. 30.)

I think the costs of all parties should come out of the estate. (Reference to *Hellier v. Hellier*, *Geaves v. Price*, *Lemage v. Goodban*, *Simpson v. Foxon*, and *Jenner v. Finch*, all *supra*.)

There should be a stay of the issue of the grant for thirty days.

May 17. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

*J. O. Dromgole*, for the appellants. The learned Judge erred in directing that letters of administration with the two wills as containing the will of the deceased be issued to the plaintiff. The first will was revoked by the second one. The document itself shews clearly that the later will was intended to be substituted for the former. The testatrix, no doubt, intended to destroy the first paper, but forgot to do so. Among the circumstances rendering this apparent is the addition of beneficiaries in the second will. *In the Estate of Bryan*, [1907] P. 125, governs the present case. I refer also to *Kent v. Kent*, [1902] P. 108, at p. 112.

*William Kingston*, K.C., for the respondents. There is no revocation, and there is nothing to prevent the two documents



standing together. There is no word in the second will revoking any clause in the first. There is an elaborate residuary clause in the first will, and, if it were held that the second will revoked the first, the result would be that the bulk of the estate would be undisposed of, and there would be an intestacy. There is nothing to indicate any change of intention between the execution of the first will and the death of the testatrix. The second will did not exhaust the estate. Only a little of the first will was copied into the second. In the cases cited by counsel for the appellants, the old will was reduced to a residuary clause. This was not the case here, as there were seven clauses in the first will which remained untouched. Besides, the two documents did not dispose of more property than the testatrix possessed at her death; and by her second will she did not dispose of all her estate. There were repetitions in the two documents, but gifts of legacies to the same persons by different instruments might be substitutional and not cumulative: *Tuckey v. Henderson* (1863), 33 Beav. 174. Most of the cases are referred to by the Surrogate Court Judges. There are some English cases (no Canadian cases are reported) in which a second paper, containing no revoking words, has been held to revoke a former paper. Such cases, of course, can be only since 1838, when the original of sec. 22\* of the Wills Act, R.S.O. 1897, ch. 128, came into existence by the English Wills Act of 1837, sec. 20. But all of these but three proceed on the ground that the second paper necessarily and in form disposed of the whole estate, or on the ground that the second contained a residuary clause, or gave the whole estate in a mass to some one, or on parol evidence of intention admitted. The three cases which may be said to be in some sense applicable are: *Plenty v. West* (1845), 1 Robertson Eccl. R. 264; *Dempsey v. Lawson* (1877), 2 P.D. 98; and *In the Estate of Bryan*, [1907] P. 125. The doctrine of these cases may be found in the *Dempsey* case, and it is this. If the second paper does not formally revoke the first, and does not dispose of the whole estate, it may actually revoke

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.

\* 22. No will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed or by the burning, tearing, or otherwise destroying the same by the testator or by some one in his presence and by his direction with the intention of revoking the same.

D. C.  
1910  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.

it and create an intestacy if the following conditions occur: if property owned by the testator at the date of the first paper, and by that paper thrown into the residue, is by the second paper specifically given to others, to some material extent, this argues and may prove a change of intention as to the disposition of the estate as a whole, and may wholly cancel and eradicate the first paper as if it had been destroyed when the second was executed. But that is not this case.

The judgment of the Court was delivered by MEREDITH, C.J., at the conclusion of the argument:—We have the benefit in this case of a very careful and elaborate judgment of the learned Judge from whose judgment this appeal is brought, in which the authorities are reviewed and his reasons given for distinguishing the case *In the Estate of Bryan*, [1907] P. 125, 76 L.J.N.S. P. 30, upon which Mr. Dromgole relies.

We see no reason to differ from the conclusion to which the learned Judge has come, and we see nothing in the provisions of the will, applying the rule as stated in *Williams on Executors* and in *In the Estate of Bryan*—the general proposition—which would justify us in holding that it clearly appears that it was the intention of the testatrix that the second will should be in substitution for the first and entirely displace it.

In the *Bryan* case there were several circumstances which do not exist in this case. In this case the bulk of the estate of the testatrix was dealt with by the residuary clause in the first will, and the effect of holding that the second will entirely revoked the first will would be that the bulk of her estate would be undisposed of, and that there would be an intestacy. It is not necessary to say that the leaning of the Courts is against giving, unless they are bound to do it, a construction which would lead to that result.

In the *Bryan* case, also, the clause which it was sought to treat as unrevoked by the second will was one by which one member of the family named Orton was given a life interest, and the subject of that life interest was given to another. The testatrix by a subsequent will revoked the life interest given to Orton, and the circumstance that she did so and the existence of that clause and her intention to interfere with it, it is manifest, I think, make

a distinction upon which the decision in that case to a large extent rested.

The two reports of the case differ, but I should judge from the language that is used that there was before the Court the first will and a draft of the second, which was a copy of the first, and that in that draft the paragraphs which were intended to be changed were scored out or marked in some way with red ink to indicate the changes to be made. So that the circumstances of that case are entirely different from this case.

Appeal dismissed.

D. C.  
1910  
—  
RE  
MOLSON,  
WARD  
v.  
STEVENSON.  
—  
Meredith, C.J.

[DIVISIONAL COURT.]

THOMPSON V. COURT HARMONY NO. 7045 ANCIENT ORDER  
OF FORESTERS.

D. C.  
1910  
—

*Benefit Society—"Sick Benefits"—Refusal of Claim—Certificate of Medical Officer—Domestic Tribunals—Interference by Court—Jurisdiction—Erroneous Certificate—"Legal Fraud."*

Feb. 8.  
June 2.

The plaintiff, a member of the defendant "court," a subordinate branch of a friendly or benefit society, incorporated by a Dominion statute and registered under the Ontario Insurance Act, applied for "sick benefits," to which he would have been entitled under the laws of the society, upon a satisfactory certificate from the medical officer of the court. The medical officer, however, certified that the plaintiff's illness was caused or contributed to by the excessive use of intoxicating liquors, and the court refused the benefits. This was affirmed by the various appellate bodies having jurisdiction under the laws of the society, but none of them had any evidence before them other than the certificate of the medical officer, and two certificates of a contrary opinion given at the instance of the plaintiff by another physician. There was no tender of other evidence by the plaintiff. In an action brought for the recovery of the amount of the sick benefits, the trial Judge heard evidence as to the cause of illness, and found that it was not caused or contributed to in the way certified to by the medical officer, and that the certificate, though honestly given, was founded upon an erroneous diagnosis:—

*Held*, that the matter was one to be disposed of by the methods of the society, to which the plaintiff subjected himself on becoming a member; and the action of the society was final, unless it was made to appear that it was contrary to natural justice, or in violation of the rules of the body, or done *malâ fide*; an erroneous medical certificate, given honestly, but by mistaken diagnosis, cannot be regarded as fraudulent; "legal fraud" does not exist in a sense distinguishing it from dishonesty or moral wrongdoing.

Judgment of the County Court of York, in favour of the plaintiff, reversed.

An appeal by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff in an action to recover \$168 for sick benefits.

D. C.  
1910  
THOMPSON  
v.  
COURT  
HARMONY.

The plaintiff by his statement of claim alleged: (1) that the defendants were a subordinate court at Toronto, where he, the plaintiff, resided, of the Subsidiary High Court of the Ancient Order of Foresters in the Dominion of Canada, a friendly society incorporated by the Dominion statute 61 Vict. ch. 91, and registered under the Ontario Insurance Act; (2) that the plaintiff was and had been for many years a member in good standing of the defendant court, and during the time that he had been a member had contributed to the sick and funeral fund, being a fund of the court established for the relief of sick and distressed members; (3) that, under the laws of the defendant court, members contributing to the sick and funeral fund who by reason of sickness or infirmity were absolutely incapacitated from work were entitled to be paid by the court sick benefits at the rate of \$4 per week of such incapacity for a period up to 52 weeks; (4) that on or about the 6th October, 1908, the plaintiff became ill, and was absolutely incapacitated from work by reason of such illness from the 6th October, 1908, until the end of July, 1909, being a period of 42 weeks, and became entitled to payment by the defendants of \$168; (5) that the plaintiff claimed from the defendants payment of sick benefits as provided for in the laws of the court, and the plaintiff performed all the requirements of the laws of the defendants for the purpose of having the sick benefits paid to him during his illness; (6) that the defendants wrongfully refused to pay the plaintiff any sick benefits; (7) that the plaintiff had exhausted all means provided under the laws of the Ancient Order of Foresters for compelling payment of the sick benefits, but without avail; and the plaintiff, therefore, claimed \$168.

The defendants by their statement of defence: (1) admitted the allegations contained in paragraph 1 of the statement of claim and denied all the other allegations contained therein; (2) said that the business of the defendant court was subject to and regulated by laws passed by the Subsidiary High Court of the Ancient Order of Foresters in the Dominion of Canada; (3) alleged that the plaintiff, when he became a member of the court, became subject to these laws; (4) that by rule 104 of the general laws it was provided that the defendant court should be liable to pay sick benefit from the date of the medical officer's certificate; (5) that no certificate had been given by the medical officer; (6) that under the general laws sick benefits cannot be paid except upon the member obtaining the



medical officer's certificate; (7) that the defendants had always been ready and willing to pay sick benefits that should be paid, upon the said certificate being delivered to the proper officer; (8) that the alleged illness of the plaintiff was due to or brought on by the use of intoxicating liquors, and that, under clause 7 of rule 104, the plaintiff was not entitled to any sick benefits; (9) that the general laws provided a tribunal open for the plaintiff to avail himself of if he felt himself aggrieved over any matter relating to his claim for sick benefits; (10) that the plaintiff should have sought relief under rule 120 of the general laws, in the manner and within the time prescribed therein, and that, until he had exhausted his remedies prescribed thereunder, he had no right to bring this action.

December 9, 10, 17, and 23, 1909. The action was tried before MORGAN, Jun. Co. C.J., without a jury.

*H. E. Rose*, K.C., for the plaintiff.

*L. F. Heyd*, K.C., for the defendants.

February 8, 1910. MORGAN, Jun. Co. C.J.:—After a very protracted trial before me, in which a great number of witnesses on both sides were called, I found without hesitation that the illness of the plaintiff was not induced or caused by or contributed to in any way by excessive use, or indeed any use, by the plaintiff of intoxicating liquors, and that the medical certificate of the defendants' medical officer so certifying was erroneous and given under an erroneous diagnosis of the plaintiff's illness; in my judgment, the medical officer was led to his conclusion not only from his diagnosis of the case, but from information conveyed to him as to the plaintiff's alleged habits.

I also found that the medical man was not guilty of any improper conduct in granting that certificate, but it was given honestly and under the conviction that he was certifying to what he really believed to be the fact, however erroneous his conclusions may have been.

I find that the defendants, on the doctor's certificate, refused to pay the sick benefit claimed by the plaintiff; that the plaintiff appealed from that decision to all the tribunals provided by the by-laws for having his case fully investigated and disposed of; and I find that the various tribunals to which he appealed did not investigate or call any witnesses or give the plaintiff an opportunity

D. C.  
1910  
THOMPSON  
v.  
COURT  
HARMONY.

D. C.  
1910  
THOMPSON  
v.  
COURT  
HARMONY.  
Morgan, Jun.  
Co. C.J.

to appear before them and give evidence as to the merits of his case, but simply reached their conclusions upon the medical certificate which I have found to be erroneous.

It was argued before me that there was another domestic remedy still open to the plaintiff under rule 121, charging the medical officer and the defendants with improper conduct in withholding the sick benefit. I do not think that remedy was open to him, because there was no ground of fraud or improper conduct alleged.

Upon these findings, then, I think, as a matter of law, I having found upon the evidence that the plaintiff's illness was not induced by intoxicants, and that he has exhausted all the remedies open to him in the domestic forums, that the conclusions of the domestic forums, though not intentionally fraudulent, amount to a legal fraud upon the plaintiff in withholding from him the sick benefits which, in my judgment, he was entitled to receive, and that, therefore, the jurisdiction of this Court is not ousted, and he is entitled to seek here the remedies necessary to enforce payment of his claim for sick benefits.

It is argued that, until a certificate of the plaintiff's illness has been produced to the defendants declaring him to be entitled to benefit, he cannot recover here. I am of opinion, in view of the findings I have made, that the certificate is not necessary to enable this Court to deal with the matter in controversy between the parties, and that the plaintiff, having exhausted all his remedies in the forums provided by the defendants' by-laws, is now entitled to seek relief here; and, upon all the facts presented to me, I find that he is entitled to recover the benefits claimed, and has done all that was required of him to do by the rules and regulations of the defendant society to entitle him to be paid.

I therefore give judgment for the plaintiff for \$160 with costs.

The defendants appealed from this judgment.

April 14 and 15. The appeal was heard by a Divisional Court composed of BOYD, C., MAGEE and LATCHFORD, JJ.

*L. F. Heyd*, K.C., for the defendants. The plaintiff, as a member of the defendant society, must comply with the decisions of the domestic forums provided by such society: *Essery v. Court Pride of the Dominion* (1882), 2 O.R. 596; *Thompson v. Planet Benefit Building Society* (1873), L.R. 15 Eq. 333; *Field v. Court Hope of*

*Ancient Order of Foresters* (1879), 26 Gr. 467. It is shewn by the evidence that the defendants had strictly followed the course of procedure laid down by their laws and regulations, and, in these circumstances, the certificate given by their medical officer, confirmed as it has been by their appellate tribunals, must be taken as final and conclusive.

*H. E. Rose*, K.C., for the plaintiff. There is no suggestion in any of the cases cited on behalf of the appellants that the rules of such an organisation as the defendant society oust the jurisdiction of the Courts. In the *Essery* case, relied on by the appellants, no question was raised as to the power of the Court to deal with the matter of the action when the time was ripe. In any proper case the Courts will interfere, but any action is regarded as premature which is brought before the person complaining has exhausted his remedies in the forum provided by the rules of the organisation. It cannot be contended that the plaintiff in this action has not exhausted the remedies provided by the society, and the evidence shews that the decision of the defendants' courts is contrary to natural justice. It is therefore open to this Court to review their decision and to act according to the justice of the case.

*Heyd*, in reply.

June 2. The judgment of the Court was delivered by BOYD, C.:—Mr. Harvie, secretary of Court Harmony, told Mrs. Thompson, wife of the plaintiff, and his father-in-law Pethick, (who were looking after the plaintiff's interests while he was ill), that, in the face of Dr. Pyne's certificate, it was impossible for a cheque to issue under the general law of the Court Harmony. This was the decision of that court, after seeing the further certificates of the 10th and 18th September brought in at the suggestion of Mr. Harvie. He says he gave the wife all the information in his power, and told her what further steps she could take in order to secure redress by way of appeal.

There was nothing said about *vivâ voce* evidence, nor was any offer made on the part of the plaintiff to do anything more than supply other doctors' certificates opposed in their tenor to that given by the medical officer of the Lodge, Dr. Pyne, which was dated on the 6th October, 1908. The inquiry as to the right to sick benefits was conducted on the footing of a dispute between doctors,

D. C.  
1910  
THOMPSON  
v.  
COURT  
HARMONY.

D. C.  
1910  
THOMPSON  
v.  
COURT  
HARMONY.  
Boyd, C.

and it was decided in favour of the duly appointed medical officer of the Lodge, who had been in its service for over twenty years.

The date of the first decision of the court is not clearly given, but it appears to have been just about the date of the second certificate of Dr. Stewart. However, this second certificate was sent on with the papers in the first appeal to the District Chief Ranger, and in all subsequent appeals all these certificates were used. Dr. Stewart admits that both his certificates were indefinite, and the second did not add much to the first, for, as he says, what it stated was that "the primary cause of part of the plaintiff's illness was decayed teeth, and not whisky." Upon a mere consideration of the certificates, one does not quarrel with the ruling of the defendants.

By transferring the claim to the County Court, an entirely new phase of controversy is entered upon, and a long investigation of the cause of the illness is conducted, in the light of conflicting and contradictory evidence, not heard by the members or officers of Court Harmony, and not offered to be brought before them. I rather think that they did not consider any more than the plaintiff that this field of inquiry was open under their code of laws and rules, but at all events the evidence was never tendered, and therefore never rejected by them. It lay upon the plaintiff to establish his claim to be the recipient of the benefits of the Foresters. He had experience of what was to be done. Twice before, he had obtained these sick payments on the certificate of Dr. Pyne. It is in evidence that the course pursued here was in all respects according to the usual methods of the Lodge. As I read the evidence of the wife and Mr. Pethick, the stepfather, they did not even state to the members of the body sued what facts could be proved as to the plaintiff's sobriety. She says, "I did not think to tell the Lodge members;" in other words, the plaintiff was content to take his chances on the conflicting medical certificates, and, having lost, he comes to a court of law for redress.

The learned County Court Judge agrees that the Court Harmony could not pay in the face of Dr. Pyne's certificate, which, under the direction of the general law of the Order, they decided to act upon. He finds that this medical certificate was given honestly but erroneously as to alcoholism having caused the plaintiff's illness, and therefore, though not intentionally fraudulent, it amounted to a legal fraud, and on this ground holds that his jurisdiction was not



ousted. He finds that the plaintiff appealed to all the series of appellate tribunals, but that they did not investigate or call any witnesses or give the plaintiff an opportunity to appear before them and give evidence as to the merits of his case, but simply reached their own conclusions upon the medical certificate now found (by the County Court Judge) to be erroneous.

The inquiry as to the man's condition, as I have said, was presented as usual upon the doctor's certificate, and considered upon all the materials that the plaintiff desired to submit. That something else was not done by him is not a ground for disregarding the conclusion of the defendants and their officers. There was really no exclusion of evidence, because there was no tender of it, and, upon the materials before the defendants, the conclusion reached was right.

The general laws of the body provide explicitly for the manner in which applicants for the sick benefits shall proceed. Forms are provided which shall be used in order to obtain a "declaration on funds:" rule 104 (17), and form, p. 125. That is a compound form, consisting of a claim by the sick member, followed by a certificate under the hand of the medical officer appointed by the subordinate court (rule 97). This rule provides that the physician shall not place any brother upon the funds unless he is unable to follow any occupation from sickness; and by (2) he may refuse to attend any sick member when satisfied that the illness is brought on through the use of intoxicating liquors, and shall not place any such brother on the funds of the court. By rule 104 the payment of sick benefits is to begin from the date of the medical officer's certificate, which is to be delivered along with a declaration on the fund to the court secretary (No. 3). By No. 6 of rule 104, no court shall pay such benefits to a member unless certified by a duly qualified medical practitioner to be incapacitated from work by some specified sickness; and by No. 7 no member shall receive benefits if he suffers from illness through the use of intoxicating liquors.

The only certificate presented by the plaintiff to the secretary of the court according to the forms prescribed was that of Dr. Pyne, the duly appointed physician of the court, and that on its face stated that the man's illness was brought on through over-indulgence in intoxicants. Upon such a certificate the plaintiff could not be placed on the funds, and the secretary had no authority to issue a cheque to him for the amount of sick benefits.

D. C.  
1910  
THOMPSON  
v.  
COUBT  
HARMONY.  
Boyd, C.

D. C.  
1910  
THOMPSON  
v.  
COURT  
HARMONY.  
Boyd, C.

By rule 120 any dispute, charge, or complaint in respect of any sick benefit due by any court to any member shall be made to the District Chief Ranger, who shall investigate the same and decide thereon, with power of appeal to the High Chief Ranger and from him to the High Court—the decision of the High Court to be conclusive and binding upon all parties.

The ruling of the secretary was in conformity with the holding of the members of the court, but exactly when the refusal was communicated to the plaintiff is not plain on the evidence. The sequence of events I take to be this. The secretary, Mr. Harvie, could not act on the document first furnished. The plaintiff had left the Lodge physician on the 26th October, and called in another doctor on the 27th. At the suggestion of Mr. Harvie, a certificate as to the cause of illness was obtained from this one, and Dr. Stewart on the 10th November stated that he found the plaintiff suffering from severe nervous prostration. This did not meet the difficulty, and Dr. Stewart says he gave a second certificate on the 18th November, because they told him the Lodge “was blaming it on the whisky.” The tenor of this certificate I have already referred to. The secretary and the Lodge did not regard Dr. Stewart’s certificate as sufficient to countervail that of the regular doctor. The plaintiff’s claim was then made before the District Chief Ranger, who examined carefully into the law (*i.e.*, of the Order), and read the correspondence and inquired into the facts produced by the court, and found that, in the face of the certificate of the medical officer of the court and general law No. 104 (7) (referring to intoxicating liquors), it was impossible for him to interfere. By the law of the court he was “to investigate the dispute, charge, or complaint.” This application was rather a complaint than a dispute or a charge. This certificate was the basis of the claim, and the complaint was that it should be neutralized or overborne by the certificate of the outside physician. Nothing was laid before the court or the officers who passed upon the claim to indicate that the opinion or judgment of Dr. Pyne was erroneous, or that, when the doctors differed, the later opinion was to be preferred to his. That the defendants did not take steps to investigate the soundness of Dr. Pyne’s opinion by original inquiries is not a matter provided for; they dealt with what was laid before them; and it is no reason for displacing their conclusion or their jurisdiction that a subsequent investigation in a court of law has led to a different result.

The matter is one to be disposed of by the methods of the Order, to which the plaintiff subjected himself on becoming a member. The action of the court is final unless it is made to appear that such action is contrary to natural justice, or in violation of the rules of the body, or done *malâ fide*, as said in *Essery v. Court Pride of the Dominion*, 2 O.R. 596, at p. 608. The judgment in appeal introduces a new and further exception, in that an erroneous medical certificate, given honestly, but by mistaken diagnosis, is, though not intentionally fraudulent, to be regarded as "legal fraud." But it needs *mala fides* or dishonesty to annul the finding of a domestic forum.

Lord Bramwell has taken particular pains to exterminate the expression "legal fraud." He says in *Weir v. Bell* (1878), 3 Ex.D. 238, 243: "I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade." "Fraud in point of law," he again repeats, "is to my mind the oddest expression:" *Holland v. Russell* (1863), 11 W.R. 757, 758. So, in accord, Brett, L.J., says in *Wilson v. Church* (1879), 13 Ch.D. 1, at p. 51: "I have very strong views with regard to what is the legal definition of fraud. It seems to me that no recklessness of speculation, however great, and that no extortion, however enormous, is fraud. It seems to me that no man ought to be found guilty of fraud unless you can say he had a fraudulent mind and an intention to deceive." To the same effect Wills, J., in *Ex p. Watson* (1888), 21 Q.B.D. 301, 309: "'Fraud,' in my opinion, is a term that should be reserved for something dishonest and morally wrong." Finally the classical utterance of Lord Bramwell in the House of Lords in *Derry v. Peek* (1889), 14 App. Cas. 337, at p. 346: "'Legal fraud' is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find, or cannot find, what duty has been violated or right infringed, but thinks a claim is somehow made out."

These defendants are a colonial branch of the "Ancient Order of Foresters" of England, one of the most prominent friendly societies of the world, and English decisions on their system of internal government are of entire pertinence in this Province. The English authorities point out that all the officers or persons selected to deal with claims and disputes are to be regarded as arbitrators, and in respect of their findings relief is to be given in courts of law or equity only when the persons designated have misconducted

D. C.  
1910  
THOMPSON  
v.  
COURT  
HARMONY.  
Royd, O.

D. C.  
1910  
THOMPSON  
v.  
COURT  
HARMONY,  
Boyd, C.

themselves or abused their powers: *Callaghan v. Dolwin* (1869), L.R. 4 C.P. 288, 295. These officers had nothing to do with getting up a case for a complainant or claimant, or with getting witnesses, or otherwise initiating any method of investigation, beyond dealing with what is laid before them and acting thereon to their best judgment—as was unquestionably done in this protracted controversy: *In re Enoch and Zaretsky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327, 332. In brief, it may be said as to these society disputes, where the officials deal as best they can with the materials brought before them, it is not enough to say they have reached an erroneous conclusion or that they have upheld an erroneous certificate: it must further appear, to give a foothold to the ordinary Courts of law, that the conclusion has been the result of corrupt motives: see *Armitage v. Walker* (1855), 2 K. & J. 211; and *Bache v. Billingham*, [1894] 1 Q.B. 107.

I think that no jurisdiction exists as to this claim of the plaintiff to warrant the judgment of the County Court. It should be vacated and the action be dismissed without costs. This as to costs, because the question is of a new and important character.

---

[RIDDELL, J.]

FITZGERALD V. MANDAS.

1910  
June 4.

*Landlord and Tenant—Lease—Repudiation by Tenant—Reletting—Eviction—Right to Rent Accrued—Interest—Election to Treat Contract as Terminated—Damages—Computation—Rent—Taxes—Improvements.*

The plaintiffs on the 29th February, 1908, made a lease to the defendant of store property in a city for a term of ten years from the 5th March, 1910, at a yearly rent of \$3,000, payable in equal parts, on the 5th day of each month, in advance, during each year of the term. The defendant covenanted to pay rent and taxes, to leave in repair, and to add certain improvements. The defendant was offered possession, but refused to take it. After some negotiation, he repudiated the lease and refused to act under it. The plaintiffs, after doing their best to make the defendant go in under the lease, advertised the property for rent, and on the 22nd April, 1910, leased it for five years to N., on terms less favourable to them as landlords than those contained in the defendant's lease. On the 7th April, 1910, immediately after the repudiation of the lease, the plaintiffs brought this action to recover two gales of rent and damages for breach of contract:—*Held*, that the plaintiffs were entitled to the two gales of rent and interest thereon.

The act of the plaintiffs in leasing to N. could not be called an eviction; and, even were it an eviction, it would not affect the liability for rent accrued due before the eviction. Nor was this the case of the landlord taking advantage of the proviso in the lease, in the statutory form, for non-payment of rent. It was the case of one contracting party expressly repudiating



to the other the contract between them, and notifying him, in unequivocal terms, that he would not be bound by it; whereupon the other was entitled to treat the contract as at an end, except for the purpose of claiming damages for the breach of it; and this even where the contract had been in part performed.

The plaintiffs, then, having elected to consider the contract at an end (except for the purpose of damages), the measure of damages was the amount by which the plaintiffs were less well off than if the contract had been performed. The damages were to be estimated under the heads of rent, taxes, and improvements.

The Court will take judicial cognisance of the facts of mathematical science; and, there being no evidence of the value of money, and the statutory rate being therefore adopted, the method to be followed in computing the damages in respect of rent up to the end of the period of N.'s lease was to determine the difference in value at the date of the judgment between the present worth of the payments under the defendant's lease and the payments under N.'s lease; and, in respect of the remainder of the period under the defendant's lease, as no evidence was given that any better terms could probably or possibly be obtained for the remaining time, it should be considered that the terms of N.'s lease were the best procurable for such remaining time; and, instead of computing the present worth of each series of payments, and deducting the present worth of the lesser from that of the greater, it would be convenient to take the loss in each month and find the present worth of these amounts.

The defendant covenanted to pay taxes, but N. did not:—

*Held*, that, although there was no covenant by the plaintiffs in the N. lease to pay taxes, the taxes were payable by the plaintiffs: R.S.O. 1897, ch. 224, sec. 26.

No evidence having been given as to whether there was any likelihood of the rate of taxation being changed, it should be assumed that the rate would remain the same throughout the period, and the present worth of the payments of taxes should be computed upon that basis.

The present worth of the improvements to be made by the defendant should also be computed.

Action for rent and for damages for breach of contract. The facts appear in the judgment.

May 30. The action was tried before RIDDELL, J., without a jury, at London.

*W. R. Meredith*, for the plaintiffs.

*J. B. McKillop*, for the defendant.

June 4. RIDDELL, J.:—On the 29th February, 1908, the plaintiffs made an indenture of lease of certain store property in London to the defendant, for ten years from a day subsequently by the parties agreed to be the 1st February, 1910, which was again extended to the 5th March, 1910: "Yielding and paying therefor yearly and every year during the said term hereby created to the . . . lessors, their executors and administrators, the sum of \$3,000, payable . . . in equal parts on the first day of each and every month, in advance, during each year of the currency of the said term. . . ." The lessee covenanted to pay rent and taxes, to leave in repair, and to

1910

FITZGERALD  
v.  
MANDAS.

Riddell, J.  
1910  
FITZGERALD  
v.  
MANDAS.

add certain improvements, buildings, etc., specified, without compensation, to buy certain shelving, etc. The defendant was offered possession, but refused to take possession. After some negotiation as to the value of the shelving, etc., at length, as it was admitted before me, he repudiated the lease and refused to act under it. The plaintiffs, after doing their best to have the defendant go in under the lease, advertised the property for rent; and finally, on the 22nd April, 1910, they leased to Neely *et al.* the premises from the 30th April, 1910, for a term of five years, at a rental of \$175 per month, beginning on the 1st June. The lessees were to have the right to remove their fixtures, and the lease was in many respects much less favourable to the landlords than that made to the defendant.

This action, begun on the 7th April, 1910, was brought immediately after the repudiation of the lease by the defendant, and by it the plaintiffs claimed the two gales of rent, \$500, and damages for breach of contract. The writ was before the Neely lease; the statement of claim (28th April), after; the statement of defence (6th May) makes a general denial, and sets up that the plaintiffs failed to give the defendant possession of the premises, and consequently he was "released from accepting any lease of the same."

At the trial before me at the London non-jury sittings, it was admitted by the defendant's counsel that the defendant had repudiated the lease; it was not denied that he had been offered possession, and had refused; there was no question as to the good faith of the plaintiffs, and their having done their very best to lease the property at the highest obtainable rental; and counsel for the defendant, admitting that his client was liable for some amount, stated that he appeared only on the question of damages.

So far as concerns the two gales of rent due the 5th March and the 5th April, there is no dispute—\$500 is due for these, and interest is to be allowed also: *Skerry v. Preston* (1813), 2 Chit. R. 245.

The act of the landlords in leasing to Neely can scarcely be called an eviction, as "to constitute an eviction at law the lessee must establish that the lessor, without his consent and against his will, wrongly entered upon the demised premises, and evicted him and kept him so evicted:" Foa, 4th ed., p. 166, citing *Baynton v. Morgan* (1888), 21 Q.B.D. 101, *per* A. L. Smith, J., affirmed 22 Q.B.D. 74; *Prentice v. Elliott* (1839), 5 M. & W. 606, *per* Parke, B.

And, even were this the case of an eviction, such eviction would not affect the liability for rent accrued due before the eviction: *Boodle v. Cambell* (1844), 7 M. & G. 386; *Selby v. Browne* (1845), 7 Q.B. 620. Neither is this the case of the landlord taking advantage of the proviso for non-payment of rent, which appears in this lease in the statutory form. Nor are we, in my judgment, embarrassed by considerations arising from the general relations of landlord and tenant. It is the case of two contracting parties, of whom the one expressly repudiates to the other the contract between them, and notifies him that he will not be bound by it, and that in unequivocal terms. In such a case the law is well settled that the other party may thereupon treat the contract as at an end, except for the purpose of claiming damages for the breach of the same: *Planché v. Colburn* (1831), 8 Bing. 14; *Hochster v. De la Tour* (1853), 2 E. & B. 678; *Withers v. Reynolds* (1831), 2 B. & Ad. 882; *Mersey Steel Co. v. Naylor Benzon & Co.* (1884), 9 App. Cas. 434; *Rhymney R.W. Co. v. Brecon and Merthyr Tydfil Junction R.W. Co.*, [1900] W.N. 169. And since the withdrawal by Lord Bramwell, at p. 446 of the report in 9 App. Cas., of what was attributed to him in *Honck v. Muller* (1881), 7 Q.B.D. 92 (*Hoare v. Rennie* (1859), 5 H. & N. 19), the rule has not been changed or affected by the fact that the contract has been in part performed.

Of course the repudiation of the contract must be plain and unequivocal: such cases as *Johnstone v. Milling* (1886), 16 Q.B.D. 460, and those cited in 9 App. Cas. and [1900] W.N., shew the strictness of the rule.

The action, then, becomes a plain common law action for damages, the plaintiffs having elected to consider the contract at an end (except for the purpose of damages), instead of, as they might have done, insisted upon its continuance. The measure of damages is the amount by which the plaintiffs are less well off than if the contract had been performed. The plaintiffs having done all in their power to minimise damages, there can be no question as to part of the claim.

The contract was for the payment of \$250 upon the 5th day of March, 1910, and upon the 5th day of each calendar month until the termination of ten years from that day; the new lease is for \$175 on the 1st day of June, 1910, and \$175 on the 1st day of each month thereafter until the 1st June, 1915. During the period up to

Riddell, J.

1910

FITZGERALD

v.

MANDAS.

Riddell, J.  
1910  
FITZGERALD  
v.  
MANDAS.

the 1st June, 1915, there is, so far as the loss of the rent is concerned, no difficulty in the computation.

The Court will take judicial cognisance of the facts of mathe-  
matical science: and, there being no evidence of the value of money,  
and the statutory rate being therefore adopted, the method will  
be to determine the difference in value at some time, preferably  
the date of the judgment, of the present worth of the two series of  
payments.

The parties expressed their willingness to accept an approxima-  
tion; the date of the 6th June, 1910, will be adopted as the most  
convenient; and, as approximation is all that is desired, the pay-  
ments under the second lease will be considered as though they also  
fell due upon the 6th of the month instead of the 1st.

In respect of the remainder of the term provided by the first  
lease, the question is not so simple; but, as no evidence was given  
that any better terms could probably or possibly be obtained for  
the remaining time, it will be fair to consider that the terms of the  
second lease will be the best procurable for such remaining time.  
Instead of computing the present worth of each series of payments,  
and deducting the present worth of the lesser from that of the greater,  
it will be convenient to take the loss in each month and find the  
present worth of these amounts. The first is payable on the 5th  
June, 1910, and the last the 5th February, 1915—the difference is  
\$75 per payment, and the sum of the present worths of these losses  
is therefore easily computed.

If we let S. = sum of the present worth of the various monthly  
losses—

$$S = 75 + \frac{75}{(1.05)^{1/12}} + \frac{75}{(1.05)^{2/12}} + \dots + \frac{75}{(1.05)^{116/12}}.$$

$$= 75 \left( 1 + \frac{1}{(1.05)} \frac{1}{1/12} + \frac{1}{(1.05)} \frac{1}{2/12} + \dots + \frac{1}{(1.05)} \frac{1}{116/12} \right)$$

a geometrical series of 117 terms. Applying the usual method of  
summation of series in geometrical progression this is:

$$= 75 \left\{ \frac{(1.05)^{117/12} - 1}{(1.05)^{117/12} - (1.05)^{116/12}} \right\}$$

$$= 75 \times 93.71$$

$$= \$7028.25.$$

I append the computation "A," shewing how this sum is arrived



at. (I append the computations that either party may examine into their accuracy before judgment is actually entered).

The next item of damages is the taxes which the defendant covenanted to pay and Neely is not to pay. It is true that there is no express covenant by the landlord in the Neely lease to pay taxes; but there is none by the tenant. In such a case in England, following the rule of the Poor Relief Act of 1610, the taxes are payable by the tenant; in Ontario the rule is different, in consequence of the provision introduced in 1850 by 13 & 14 Vict. ch. 67, sec. 7: "Any occupant may deduct from his rent any taxes he may have paid, if the same could also have been recovered from the owner, unless there be a special agreement between the occupant and the owner to the contrary." This was re-enacted in 1853 by 16 Vict. ch. 182, sec. 7, and has been continued through all the various revisions, now appearing as R.S.O. 1897, ch. 224, sec. 26. *Dove v. Dove* (1868), 18 C.P. 424, is a decision upon the point.

No evidence was given to enable me to judge whether there is any likelihood of the rate of taxation being changed. Notwithstanding frequent repeated outcries against taxation increase, and our chronic indisposition to pay taxes at all, there is no great likelihood of a rate of taxation once established being diminished, except perhaps in the case of a dead or dying city, and London is quite the reverse of that. I therefore consider that the taxes will remain at least as high. It is said that the taxes are "about \$20 a month." With this indefinite evidence I allow \$240 per annum for the taxes; and, as there is no evidence when the taxes are to be paid, they may be considered as paid at the end of each year of the tenancy of the defendant, 5th March, 1911, 1912, etc., to 1917. The present worth of these payments:

$$S' = \frac{240}{(1.05)} 9/12 + \frac{240}{(1.05)} 21/12 + \dots + \frac{240}{(1.05)} 117/12.$$

$$= 240 \left\{ \frac{1}{(1.05)} 9/12 + \frac{1}{(1.05)} 21/12 + \dots + \frac{1}{1.05} 117/12 \right\}$$

a geometrical series of 10 terms.

Applying the usual methods of summation of such a series this

$$S' = 240 \left\{ \frac{(1.05) 117/12 - 1}{(1.05) 120/12 - (1.05) 117/12} \right\}$$

$$= 240 \times 7.56. \text{ See computation B.}$$

$$= \$1814.40.$$

Riddell, J.

1910

FITZGERALD

v.

MANDAS.

Riddell, J.  
1910  
 FITZGERALD  
 v.  
 MANDAS.

I append the computation "B," shewing how this sum is arrived at.

Then the improvements, etc., which the defendant was to put and leave upon the property. These amount to \$2,488.50; but, as they were not to become the property of the landlord until the end of the term, their value to him on the 5th June, 1910, would be 2488.50

(1.05) 117/12

= \$1546.47.

I append the calculation "C."

No claim is made for cost of advertising, etc., or for loss by refusal of the defendant to take over the chattels, etc., etc., and the above are all the items of damage claimed for.

There is a slight error in favour of the plaintiffs in the first computation due to taking the 5th of each month instead of the 1st for the due-date of each payment of rent by the new tenant Neely, but that is within a few cents either way of \$11.25. The amount \$7,028.25 should be reduced by this sum and \$7,017 allowed upon this head.

The following then will be the items of damage, etc.—

1. Sums due before 5th June, 1910.

Rent due 5th March, 1910 .....	\$200.00
Int. to 5th June, 1910 .....	2.50
Rent due 5th April, 1910 .....	200.00
Int. to 5th April, 1910.....	1.67
Rent due 5th May, 1910 .....	200.00
Int. to 5th June, 1910 .....	.83
	<hr/> \$ 605.00

2. Amount per computation "A" adjusted..... 7,017.00

3. Amount per computation "B" ..... 1,814.40

4. Amount per computation "C" ..... 1,546.47

Total..... \$10,982.87

Judgment will be entered for the plaintiffs as of the 6th June, 1910, for \$10,982.87 and costs (the extra day's interest is trifling).

[It is thought unnecessary to print the computations appended to the judgment.]

[RIDDELL, J.]

JOHNSON V. BIRKETT.

1910

June 10.

*Evidence—Examination of Plaintiff for Discovery—Death of Plaintiff—Continuation of Action by Executor—Depositions on Examination—Inadmissibility, as Evidence for Plaintiff—Principal and Agent—Moneys Intrusted to Agent for Purchase of Shares—Appropriation of Shares of Agent to Principal—Absence of Evidence to Shew Good Faith and Full Disclosure.*

The original plaintiff died after having been examined for discovery in the action, and the action was continued by her executor by virtue of an order obtained for that purpose:—

*Held*, that the depositions of the original plaintiff upon her examination could not be read as evidence to prove the plaintiff's case: for (1) the evidence could not be used at any stage of the action against the defendant upon any proceeding in the lifetime of the witness; (2) an examination for discovery is not an affidavit, so that Con. Rule 483 can apply; and (3) the Rules provide for the use in evidence of the examination for discovery of the opposite party, and *expressio unius est exclusio alterius*.

The application for leave to read the depositions should have been made before the trial, and was treated as if so made, though in fact made at the trial.

An agent, stock broker or other agent, employed to buy stock for another, cannot be allowed to transfer so much stock of his own as a fulfilment of his mandate. An agent may, indeed, sell to his principal property of his own, if it be proved that no advantage was taken by the agent of his position, and that the transaction was entered into in perfectly good faith and after full disclosure; but the onus of proving this lies upon the agent.

The defendant, having instructions from the plaintiff to buy for her 500 shares of the capital stock of a company, and having received \$500 for her for that purpose, did not buy for her 500 shares at all, but bought for himself 2,000 shares of pooled stock, out of which he intended to give her 500 shares (as being bought from himself) when the stock should be issued. The defendant did not give evidence to shew good faith and full disclosure:—

*Held*, that he was liable for the return of the \$500 and interest.

*Gillett v. Peppercorne* (1840), 3 Beav. 78, followed.

ACTION to recover \$500, in the circumstances stated in the judgment.

June 7. The action was tried before RIDDELL, J., without a jury, at Toronto.

W. C. MacKay, for the plaintiff.

J. C. Sherry, for the defendant.

June 10. RIDDELL, J.:—This action was begun by Mrs. Johnson, of Toronto, in September, 1908, against Dr. Birkett, of Ottawa, claiming the return of \$500 alleged to have been paid by her to the defendant in 1906. After the pleadings had been delivered she was examined for discovery, *i.e.*, in February, 1909. She died in December, 1909, and Reaman, her executor, took out an order to continue.

Riddell, J.

1910

JOHNSON

v.

BIRKETT.

The case came down for trial before me on the 7th June, 1910, at the non-jury sittings at Toronto.

The plaintiff offered as evidence the examination for discovery of the deceased; the defendant objecting, I allowed the examination to be marked for identification only; and the trial proceeded. The plaintiff then read certain parts of the examination for discovery of the defendant, and rested his case. The defence being called for, counsel expressed his inability to have his client present to give evidence, and, after being warned that if he insisted upon the action being disposed of by me on the present case, and wholly relying upon the weakness of the plaintiff's case, he would probably not, in the event of a finding by me against him being moved against, be allowed to give any further evidence or have a new trial, he insisted that the action should be disposed of on the plaintiff's case.

It becomes necessary to consider whether, under the circumstances, the plaintiff can be allowed to make use of the examination for discovery of the original plaintiff, his testator.

I referred to a case not wholly unlike: but, upon having the papers and records searched, I find that this case is not in point, although it is rather curious—and it caused some comment at the time: *Le Vesconte v. Kennedy*. That action was for a declaration, as against the assignee of an insolvent estate, that certain promissory notes made by the insolvent should be allowed to rank against the estate. In June, 1888, an application was made for speedy judgment, upon which application was read an affidavit of the plaintiff setting out that he was the holder of the notes, that the defendant was indebted to him in the amount thereof, waiver of protest by the insolvent, accounting for delay in taking proceedings by alleging request by the insolvent and promises by him, etc., admissions of liability by the insolvent, and offer of compromise by the defendant, that, in the belief of the deponent, there was no defence to the action, and that the appearance was entered for purposes of delay only. The defendant also filed an affidavit, and the application was refused by Mr. Dalton, Master in Chambers. The plaintiff died in August, 1888, and an order to continue in the name of his administrator was taken out. The action went on; statement of claim and statement of defence were duly delivered; and, the action being set for trial, the administrator applied for an



order to read at the trial as evidence the affidavit of the deceased made upon the motion for final judgment. The affidavit of the applicant upon this motion set out the facts above mentioned, that a copy of the deceased plaintiff's affidavit had been served with the copy of the notice of motion for speedy judgment with a letter, and that "every facility was afforded to the defendant to cross-examine the plaintiff thereon." It was also sworn that, unless the affidavit of the deceased was allowed to be read at the trial of the action, the administrator would be materially prejudiced in his endeavours to substantiate the claim sued on. Mr. Dalton, Master in Chambers, after reserving judgment, on the 16th November, 1889, made an order that the affidavit of the deceased should be read "as evidence in support of the plaintiff's claim . . . at the trial" of the action, and that the defendant might also use at the trial of the action his affidavit filed on the motion for speedy judgment, but, if he did so, he should produce himself for cross-examination thereon. The affidavit of the deceased was read at the trial, that of the defendant was not. The learned trial Judge (Falconbridge, J.) held the waiver established, and gave judgment for the plaintiff with costs. Upon appeal, the Common Pleas Divisional Court reversed the judgment—Rose, J., who gave the judgment of the Court, saying: "The original plaintiff made an affidavit in the cause on the 7th of June, 1888, on a motion for judgment. This was read at the trial, pursuant to an order of the Master in Chambers: see sec. 20, R.S.O. 1887, ch. 124; Con. Rule 564. Mr. Cassels thought the order should not have been made, but, having been made and not moved against, the evidence was received and read at the trial, and must now be considered." And the learned Judge proceeded to consider the allegations contained in the affidavit, along with the other evidence; and came to the conclusion that, in the light of such other evidence, the facts were not established by the affidavit. The case went to the Court of Appeal, and the appeal was dismissed. I find no account of any remarks by that Court or any member of it as to the propriety of Mr. Dalton's order. The proceedings, so far as they are in print, will be found in vol. 98 (N.S.) of the Printed Cases in the Court of Appeal, in the general library at Osgoode Hall.

R.S.O. 1887, ch. 124, sec. 20, is the same in substance as R.S.O. 1897, ch. 147, sec. 20; Con. Rule 564 referred to in the Divisional

Riddell, J.

1910

JOHNSON

v.

BIRKETT.

Riddell, J.

1910

JOHNSON

v.

BIRKETT.

Court judgment is practically the same as the present Con. Rule 483. Whether the order was rightly made or not, it will be seen that the document to be read was an affidavit—and Con. Rule 483 gives the Court or a Judge power for sufficient reason to “order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial,” subject to the condition found in the last part of the Rule. Consequently, the order might be upheld as coming within the precise words of the Rule.

It was said in *Drewitt v. Drewitt* (1888), 58 L.T.R. 684, that a motion under this Rule should be made before trial, but the Judge there (Brett, J.) said he would treat the application at the trial as having been made before the trial—and I shall pursue the same course in the present instance, and treat the application by the plaintiff to read the examination for discovery of Mrs. Johnson as an application regularly made for that purpose before trial.

Notwithstanding that the general rule is that, “in the absence of agreement between the parties, the evidence must be taken in Court *vivâ voce*”—*Perkins v. Slater* (1875), 45 L.J.N.S. Ch. 224—there are some instances in which an affidavit may be allowed to be read *in invitum*: e.g., in *Elias v. Griffith* (1877), 46 L.J.N.S. Ch. 806, an interlocutory motion had been made for an injunction, a witness had made an affidavit for use upon the motion, but had not been cross-examined, the motion had been ordered to stand over to the hearing, the witness died—at the hearing Hall, V.-C., admitted this affidavit *de bene esse*, and upon consideration thought that he was right. The learned Vice-Chancellor cites *Lawrence v. Maule* (1859), 4 Drew. 472. In that case affidavits which had been used upon one motion were allowed to be read upon another motion in proceedings between the same parties with the same issue. The well-known rule is followed: “Where an issue has been raised between certain parties, and evidence has been adduced upon that issue by one of the parties which could be used by him as against the other party, and in a subsequent proceeding the same issue is raised between the same parties, and the witness who gave the evidence in the former proceeding has died, the Court will admit the evidence given by the deceased witness in the former as evidence in the subsequent proceeding.” The admission of the affidavit in the case of *Elias v. Griffith* might be upheld, as the adjourned

motion upon which it could properly be used was being disposed of at the trial; but the Vice-Chancellor plainly puts the admission upon the general ground.

There are many cases of evidence at previous trials being used in subsequent trials, the witness having died in the interval: see, *e.g.*, the cases in note 4 to sec. 464, Taylor on Evidence, 10th ed.; and some cases of examinations *de bene esse*.

The well-known case in our own Courts of *Erdman v. Town of Walkerton* (1892-3), 22 O.R. 693, 20 A.R. 444, *Town of Walkerton v. Erdman* (1894), 23 S.C.R. 352, is one instance. John B. Erdman brought an action against the Town of Walkerton for damages caused by nonrepair of their highway: in that action he was examined *de bene esse*; he then died; the action was not proceeded with, but another action was brought by his widow under Lord Campbell's Act for his death, one Heughan being added in this action as a defendant. The Master in Chambers made an order that this examination might be used as evidence at the trial of the second action, and the defendants gave notice of appeal. Before the appeal could be heard, the case came down for trial before Street, J., and a jury; that learned Judge refused to allow the depositions to be given in evidence, and withdrew the case from the jury, there being admittedly not sufficient evidence without them. Some six weeks thereafter the same learned Judge heard the appeal from the Master's order, and allowed the appeal. The plaintiff moved the Divisional Court by way of appeal from both judgments. The Queen's Bench Division (Armour, C.J., and Falconbridge, J.) allowed the appeal; this was affirmed by the Court of Appeal and by the Supreme Court, Taschereau and Gwynne, JJ., dissenting. The evidence, however, was only allowed against the original defendant and not against the added defendant: see 20 A.R. at p. 463.

And in some instances even affidavits have been allowed. See note 5, sec. 465, Taylor on Evidence, 10th ed. But I can find no instance of any statement, though under oath, by a person who subsequently dies being used, except where the statement could at some time during the life of the deceased be made use of against the party against whom it is subsequently desired to use it.

In the *Levesconte* case, the affidavit of the original plaintiff was

Riddell, J.

1910

JOHNSON

v.

BIRKETT.

Riddell, J.

1910

JOHNSON

v.

BIRKETT.

evidence against the defendant upon the motion for speedy judgment; in the *Elias* case, certainly upon the interlocutory motion for injunction; and, as I think, when the trial Judge was at the trial to dispose of the injunction motion, in the *Erdman* case, in the previous action.

The clause in the rule above referred to, "which could be used by him as against the other party," is not idle or wholly surplusage. Perhaps, in view of the *Erdman* case, the words "by him" must be deleted, but the rest of the clause must, in my view, stand.

The expression in the judgment of the Master in Chambers, 22 O.R. at p. 700, "His evidence could be used by the defendants, if in their favour, against the present plaintiff, and if so, it seems to me the plaintiff can use it against the defendants," is to be read with caution. The test is not, "Could the defendants make use of the evidence?" nor do the cases cited indicate such a rule. The rule is that, unless the defendants could have made use of it, the plaintiff cannot; but it by no means follows that, if the defendants could have made use of it, the plaintiff may also. The rule is laid down accurately by Hagarty, C.J.O., at p. 448 of 20 A.R.: "Nobody can take benefit by such evidence who had not been prejudiced by it had it gone contrary."

In *Morgan v. Nicholl* (1866), L.R. 2 C.P. 117, 118, "Such evidence . . . is not admissible against the defendant, unless it would also be admissible against the plaintiff." To the same effect is *Doe d. Hulin v. Powell* (1852), 3 Car. & K. 323. Because it is admissible against the party seeking to use it, it by no means necessarily follows that it is admissible against the other; but no one can make use of it unless it would be evidence against him.

Cases such as *Randall v. Atkinson* (1899), 30 O.R. 242, 620, are not helpful; many cases of interest are mentioned in the judgments of Rose, J., and Boyd, C.

Now, Con. Rule 461 allows any party at a trial to use in evidence any part of the examination for discovery of the opposite party; but it does not allow the use by a party of any other examination; the plaintiff cannot use his examination for discovery as evidence against the defendant—and I see nothing in the Rules or practice changing this after the death of the plaintiff. Moreover, the Con.



Rule provides for the use of an examination not known to the common law, in a particular way: and I think *expressio unius est exclusio alterius* in this as in so many instances.

I have been furnished with a memorandum of a case of *Reid v. Diebel*, tried before my brother MacMahon at the Toronto non-jury sittings on the 17th May, 1909. In that case the counsel for the plaintiff apparently had put in portions of the examination for discovery of the deceased original defendant. Counsel for the defendant then desired to put in the remainder of the examination, and this was objected to. His Lordship said: "I will allow you to read it: you can take the consequences;" whereupon the examination was read and put in. In the reasons for judgment (1909), 14 O.W.R. 77, the examination for discovery is not referred to: and I should think it was not of importance. I do not think that this is a decision upon the point—the ruling of the learned Judge was nothing more than an admission of the evidence, subject to the objection—with an intimation that there might be unfortunate consequences for the defendant offering it.

There is nothing in principle or in authority to justify my admission of this examination to prove the case of the plaintiff here; and I accordingly reject it. My reasons briefly are: (1) the evidence could not be used at any stage of the action against the defendant upon any proceeding in the lifetime of the witness; (2) an examination for discovery is not an affidavit, so that Con. Rule 483 can apply; and (3) the Rules provide for the use to be made of the examination of another, and *expressio unius est exclusio alterius*.

Turning now to the admissible evidence. The statement of defence puts everything in issue except that the defendant on or about the 24th August, 1906, "secured from the plaintiff instructions to purchase for her 500 shares of the capital stock of the Boston Mines Co. Ltd. at or for the price or sum of \$1 per share."

The examination for discovery of the defendant sets out that he received a cheque for \$500 from the plaintiff about the 24th August, 1906, which he cashed—that he had an agreement with the company for some shares, but they are still "pooled" and so not issued—that Mrs. Johnson bought some of his 2,000 shares in August, 1906, and by August, 1906, he had been paid by her for them. No shares have been issued yet to her, because her solicitor didn't want it. He used the \$500 received as his own, and did not pay it to anybody

Riddell, J.

1910

JOHNSON  
v.

BIRKETT.

Riddell, J.  
1910  
JOHNSON  
v.  
BIRKETT.

as the price of shares in the company; he never offered her certificates for any shares; he never had them to offer; the only thing he had was his agreement; on the 27th July, 1908, he received a letter from the solicitor of the plaintiff that his authority to buy shares was revoked, and requiring him to return the \$500, which he refused to do.

Taking the admissions in the pleadings and the examination together, it sufficiently appears that the defendant, having instructions from the plaintiff to buy for her 500 shares of the capital stock of the company, and having received \$500 from her for that purpose, did not buy for her 500 shares at all, but bought for himself 2,000 shares of pooled stock, out of which he intended to give her 500 shares (as being bought from himself) when the stock should be issued—and that, the defendant not having carried out his instructions exactly, his authority was revoked and the money demanded back.

“It is the plain duty of every agent to do the best he can for his principal,” says Sir John Romilly, M.R., in *Bentley v. Craven* (1853), 18 Beav. 75, at p. 77; and therefore it might be fairly contended that it was the duty of the defendant to procure the stock at the cheapest price, notwithstanding that the instructions from his principal were to buy the stock “at or for the price or sum of \$1 per share,” the price stated being then considered as the maximum price to be paid. But, passing that argument over, and adopting strictly and literally the dictum of the same learned Judge in *Pariente v. Lubbock* (1855), 20 Beav. 588, at p. 592, “It is . . . quite clear, that he is bound to follow the directions of his principal, and is not answerable for any injury which may occur, if he strictly and directly follow the instructions that are given him”—the defendant is not advanced. He was told to buy for Mrs. Johnson; he took an agreement in his own name. Even had he (as he now suggests) sold to her 500 shares out of 2,000 which he had at his disposal, he was still in fault. An agent, stock broker or otherwise, employed to buy stock for another, cannot be allowed to transfer so much stock of his own as a fulfilment of his mandate. In *Gillett v. Peppercorne* (1840), 3 Beav. 78, the plaintiff, upon the recommendation of the defendant, bought through him a number of shares in a waterworks company—these were transferred to the plaintiff by certain third parties. Six or seven years afterwards, the plaintiff

discovered that these shares had really belonged to the defendant, and had been, shortly before the sale to the plaintiff, transferred into the names of the apparent vendors as trustees for the defendant. There was no question of the unfairness of the price paid. The plaintiff, upon discovery of the facts, filed a bill for a return of the purchase-money and interest. Lord Langdale, M.R., said, p. 83: "The defendant sold the shares which were belonging to himself to the plaintiff, when, at the time, he was appearing to the plaintiff to act as his agent, and to be purchasing them from somebody else . . . It is said that this is every day's practice in the city. I certainly should be very sorry to have it proved to me that such a sort of dealing is usual . . . I am of opinion that these transactions cannot be supported . . . It is not necessary to shew that fraud was intended, or that loss afterwards took place in consequence of these transactions, because the defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the plaintiff that the transaction cannot, in the contemplation of the Court, be considered valid." The decree was that the defendant should repay the purchase-money with interest and the plaintiff transfer the shares and account for all dividends received. See also *Robinson v. Mollett* (1875), L.R. 7 H.L. 802, at pp. 815, 836, 838: *Conmee v. Securities Holding Co.* (1907), 38 S.C.R. 601, at p. 615.

While this is the general rule, it has never, since the great case of *Lord Selsey v. Rhoades* (1824), 2 Sim. & Stu. 41, before Sir John Leach, which afterwards went to the House of Lords (1827), 1 Bli. N.R. 1, been doubted that the agent may sell to his principal property of his own, if it be proved that no advantage was taken by the agent of his position, and that the transaction was entered into in perfectly good faith and after full disclosure. But the onus of proving all this lies upon the agent.

In *Lowther v. Lowther* (1806), 13 Ves. 95, at p. 103, the Lord Chancellor Erskine says: "The principle upon which a Court of Equity acts . . . having been settled in many instances . . . an agent to sell shall not convert himself into a purchaser; unless he can make it perfectly clear that he furnished the employer with all the knowledge which he himself possessed." The same rule, of course, applies to agents to buy as to agents to sell.

So in *Molony v. Kernan* (1842), 2 Dr. & War. 31, the Irish Lord

Riddell, J.

1910

JOHNSON  
v.  
BIRKETT.

Riddell, J.

1910

JOHNSON

v.

BIRKETT.

Chancellor Sugden, afterwards Lord St. Leonards, L.C., says, pp. 38, 39: "It must be proved that full information has been imparted, and that the agreement has been entered into with perfect good faith."

It may well be that had the defendant seen fit to give evidence, he might have shewn not only perfect good faith on his part, but also full information given, but he has not done so. He makes the statement in a letter, but does not swear to it.

In any view of the case, upon this evidence the plaintiff is entitled to judgment. I follow the decision in *Gillett v. Peppercorne*, and direct judgment to be entered for the sum of \$500 and interest at 5 per cent. from the day of the receipt of the cheque of Mrs. Johnson by the defendant—which appears to be the 24th August, 1906. (Interest computed to the 10th June, 1910, at \$94.86.)

The plaintiff is also entitled to costs, and, as the action was begun before the Act of 1910, 10 Edw. VII. ch. 30 (O.), the costs should not be affected by the passing of that Act.

---



## [DIVISIONAL COURT.]

## REX V. GRAVES.

*Appeal—Habeas Corpus—Refusal of Judge to Discharge Prisoner—Jurisdiction of Divisional Court—Substantive Application for Writ—Res Adjudicata—Successive Applications for Writ—"Action"—Consolidated Rules—Appeal to Court of Appeal—Option of Attorney-General—Appeal on Points not Raised below—Warrant of Commitment—Interlineation—Liquor License Act—Conviction for Second Offence—Authority of Magistrate Making First Conviction—Police Magistrate—Justice of the Peace—Jurisdiction—Form of Warrant—Schedule L—Place of Conviction—"Unlawfully"—Address of Warrant—Description of Keeper of Gaol—Constables—Interlineations and Erasures in Conviction—Costs—Distress—Imprisonment—Charges for Conveying to Gaol—Amendment—Criminal Code, secs. 754, 1124—Proof of Prior Conviction—Liquor License Act, sec. 101(1)—Amending Act—"And not before"—Change from Imperative to Directory—Proof by Testimony of Persons Present—Invalidity—Changing Conviction to one for First Offence.*

D. C.

1910

May 10.

June 10.

The defendant, being imprisoned under a conviction for an offence against the Ontario Liquor License Act, obtained a writ of *habeas corpus* (with *certiorari* in aid) and moved for an order for his discharge, which was refused by a Judge in Chambers:—

*Held*, BRITTON, J., dissenting, that a Divisional Court of the High Court had no jurisdiction to entertain an appeal from the Judge's order.

*Re Harper* (1892), 23 O.R. 63, followed.

*Rex v. Teasdale* (1910), 20 O.L.R. 382, not followed.

*Held*, also, *per* RIDDELL, J., that the Divisional Court could not entertain a substantive application for a writ of *habeas corpus*; the matter being *res adjudicata* unless and until the decision of the Judge in Chambers was got rid off; and the Divisional Court as a Divisional Court having no jurisdiction.

*Rex v. Miller* (No. 2) (1909), 19 O.L.R. 288, followed.

*Held*, also, *per* RIDDELL, J., that, though a person is limited, by reason of the appeal to the Court of Appeal given by the Habeas Corpus Act, to one *habeas corpus*, the common law right to go from Judge to Judge until either a writ is obtained or every Judge has refused, still remains.

*Taylor v. Scott* (1899), 30 O.R. 475, and *Rex v. Akers* (1910), 1 O.W.N. 672, explained.

*Held*, also, *per* RIDDELL, J., that the proceeding begun by the writ of *habeas corpus* was not an "action," within the meaning of the Consolidated Rules.

*Held*, also, *per* RIDDELL, J., that the fact that in this particular case (the conviction being under the Liquor License Act) the right of appeal was not or might not be absolute, but only at the option of the Attorney-General, did not affect the rule in *Taylor v. Scott*, *supra*.

Notwithstanding the objection to the jurisdiction of the Divisional Court, RIDDELL, J., considered the points raised by the appeal, and stated his opinion thereon, as follows:—

1. While it is the general rule that an appellant is not allowed to raise in the appellate Court anything which has not been raised below, the rule is not applied in cases affecting the liberty of the subject.
2. That the warrant of commitment was not bad because the word "liquor" was interlined in the recital of the conviction of the defendant for having "unlawfully sold liquor without the license," etc.
3. That the warrant of commitment sufficiently shewed the authority of the magistrate alleged to have previously convicted the defendant (the conviction under which he was imprisoned being for a second offence).

D. C.  
1910  
REX  
v.  
GRAVES.

4. That, while in the conviction the magistrate was described as "the undersigned William Lawson, Police Magistrate in and for the said county of Frontenac, and one of His Majesty's Justices of the Peace for the said county of Frontenac," but, in speaking of the prior conviction the words were "before me, the said William Lawson," it was to be taken that the prior conviction was made by Lawson, not as a Justice of the Peace, but as Police Magistrate, in which latter capacity only he would have jurisdiction.

*Hunt qui tam v. Shaver* (1895), 22 A.R. 202, followed.

5. That the objection that the warrant did not state the place at which the conviction for the second offence took place was answered by saying that the form in schedule L. to the Liquor License Act had been followed.
6. That, although the warrant of commitment, in describing the offence in the recital of the conviction, omitted the word "unlawfully," while otherwise following the form in schedule F.(3), it was sufficient, having regard to sec. 72 of the Liquor License Act.
7. That the warrant (in the form in schedule L.) was sufficiently addressed to the keeper of the common gaol, by the description of his official character, though not by his name as an individual, to justify him in detaining the prisoner; the warrant was produced by the keeper, and the Court was not concerned about the description of the constables.
8. That the conviction was not invalidated by reason of interlineations and erasures in material parts; the conviction must be read with the interlineations and erasures as they appeared.
9. That the provision in the conviction, after the adjudication of imprisonment for three months for the offence, that the defendant should pay the costs of the complainant, and, if not paid, that the costs should be levied by distress, and, in default of sufficient distress, that the defendant should be imprisoned for fifteen days, unless the said costs and the charges of conveying the defendant to gaol were sooner paid, was warranted by the Criminal Code, except as regards the charges of conveying the defendant to gaol; as to which charges sec. 739 of the Criminal Code (as amended by 8 & 9 Edw. VII. ch. 9) did not apply, nor sec. 89 of the Liquor License Act, nor R.S.O. 1897, ch. 90; nor could the conviction be amended under sec. 105 of the Liquor License Act (distinguishing *Rex v. Degan* (1908), 17 O.L.R. 366); but, if the conviction was in other respects good, the Court should (if it had jurisdiction) exercise the power given by secs. 1124 and 754 of the Criminal Code, and make a proper conviction.
10. That the effect of the amendment, by 9 Edw. VII. ch. 82, sec. 209, of sec. 101(1) of the Liquor License Act, striking out the words "and not before," is to make the provision directory, instead of imperative and peremptory.
11. That the prosecutor, though interested, was not an incompetent witness: Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 3; R.S.O. 1897, ch. 73, sec. 2.
12. That the prior conviction could not be proved by persons present in Court when the alleged conviction took place; the prior conviction not being proved, the conviction for a second offence could not stand; *BRITTON, J.*, agreeing in this.
13. That the case could not be remitted under sec. 105 (3) of the Liquor License Act (9 Edw. VII. ch. 82, sec. 32), which only applies where evidence has been rejected; nor could proceedings be taken under sec. 101(5), the previous conviction not having been set aside; but the Court might (if it had jurisdiction) proceed under sec. 1124 of the Code, and make use of the power given under sec. 754, to make a conviction as for a first offence.

APPLICATION, on the return of a writ of *habeas corpus* and *certiorari* in aid, to discharge the defendant from the common gaol at Kingston, where he was confined. He was, on the 7th January,

1910, by the Police Magistrate for the county of Frontenac, at Kingston, convicted for that he unlawfully sold liquor without the license required by law, and that he was previously, to wit, on the 8th day of August, 1908, convicted of having unlawfully sold liquor without the license by law required.

The grounds of attack were: (1) that the warrant was void on its face, as having an unverified interlineation of a material character; (2) that there was no statement in the conviction of the capacity in which William Lawson acted when the previous conviction was made; (3) that the commitment did not say with reference to the first offence that it was an unlawful sale; and (4) that, in any event, and mainly, there was an adjudication by the convicting magistrate without authority, among other things, that, in default of payment by the defendant of the charges of conveying him to the common gaol at Kingston, he was to be imprisoned therefor.

April 5. The application was heard by SUTHERLAND, J., in Chambers.

*J. B. Mackenzie*, for the defendant.

*J. R. Cartwright*, K.C., for the Crown.

May 10. SUTHERLAND, J. (after setting out the facts as above):—In reference to the first objection, the word “liquor” said to be interlined in the warrant without verification appears in the conviction, which is therefore complete in that respect; and, as it is perfectly plain upon the warrant what is meant, I do not give effect to this objection.

As to the second objection, the Police Magistrate is described, both before and afterwards in the conviction, as the Police Magistrate in and for the county of Frontenac, but, in any event, on the papers before me, namely, in the evidence of John A. Ayearst, there is the statement that he was present on the 8th August, 1908, when the defendant was convicted before William Lawson, Police Magistrate, county of Frontenac, of selling intoxicating liquor at his hotel, etc. I cannot, therefore, give effect to this objection.

As to the third objection, that no “unlawful” sale is mentioned in the conviction, it was pointed out in argument that the word is not part of the language used in the Liquor License Act, and that

D. C.  
1910  
REX  
v.  
GRAVES.

D. C.

1910

REX

v.

GRAVES.

Sutherland, J.

the remaining words used are clear and sufficient under it to shew the charge. I agree with this view of the matter.

As to the fourth objection, there are large powers of amendment in a proper case. It appears here that the conviction is clearly right. It is suggested that the words "and charges of conveying the said Daniel Graves to the said common gaol" may be struck out of the conviction. Authority for this is cited, namely, *Rex v. Degan* (1908), 17 O.L.R. 366.

I think, in the circumstances of this case, that course might well be taken, and I order and direct accordingly.

The application for the prisoner's discharge is, therefore, refused, without costs.

The defendant appealed to a Divisional Court of the High Court from the order of SUTHERLAND, J.

May 28. The appeal came on for hearing before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. R. Cartwright*, K.C., for the Crown, took the preliminary objection that no appeal lay to a Divisional Court, citing *Re Harper* (1892), 23 O.R. 63. The contrary view was taken by a Divisional Court in *Rex v. Teasdale* (1910), 20 O.L.R. 382, but *Re Harper* was not referred to in the argument. It is submitted that the decision in the *Harper* case is correct, having in view secs. 120 and 121 of the Liquor License Act, taken in connection with secs. 2 and 8 of the Habeas Corpus Act, 9 Edw. VII. ch. 51 (O.) Section 2 of the last mentioned Act gives the Judge before whom the original application is made the option of making the writ returnable before a Divisional Court, or of directing that the motion for the writ should be adjourned to be heard before a Divisional Court, the intention apparently being that the whole matter should be dealt with on one application.

*J. B. Mackenzie*, for the defendant, argued that the question of jurisdiction was concluded by the *Teasdale* case, and that the *Harper* case was distinguishable. He also referred, on this point, to *Regina v. Beemer* (1888), 15 O.R. 266.

The appeal was heard subject to the objection.

*Mackenzie*. On the merits, a principal objection is that the warrant is void on its face, as it contains a material interlineation which is unverified: *Master v. Miller* (1763), 1 Sm. L.C., 11th ed.,



p. 767. That was a case of alteration of a date, but at common law a material interlineation stands on the same footing as a material erasure. An invalid commitment cannot be made good in this respect. [RIDDELL, J., referred to *Rex v. Graf* (1909), 19 O.L.R. 238.] There is a distinction between amending a conviction and amending a commitment, and a prisoner might lawfully resist arrest under an invalid warrant: see *The King v. Inhabitants of Austrey* (1817), 6 M. & S. 319, at p. 326. In the statement of the prior conviction there was no statement of the capacity in which the person making the conviction acted. The commitment is bad in not saying that the first offence was an unlawful sale, and the magistrate had no jurisdiction to award that the defendant should be imprisoned in default of payment by him of the costs of conveying him to gaol. There is no sufficient proof of the first conviction.

*Cartwright*, for the Crown, argued that the objections raised to the conviction on the merits were insufficient, and that in any case the objection to the jurisdiction of the Court to entertain the appeal was well founded.

*Mackenzie*, in reply.\*

June 10. RIDDELL, J.:—Daniel Graves was on the 4th February, 1910 (as appears by the conviction), convicted before "William Lawson, Police Magistrate in and for the . . . county of Frontenac, and one of His Majesty's Justices of the Peace for the said county of Frontenac, for that he, the said Daniel Graves, did on the 7th day of January, 1910, at the township of Portland, in said county, unlawfully sell liquor without the license by law required; and, it appearing to me that the said Daniel Graves was previously, to wit, on the 8th day of August, A.D. 1908, at the city of Kingston, before me, the said William Lawson, duly convicted of having on the 14th day of July, A.D. 1908, at the said township of Portland, in the county of Frontenac, unlawfully sold liquor without the license therefor by law required, I adjudged the offence of the said Daniel Graves hereinbefore firstly mentioned to be his second offence against the Liquor License Act (John Moreland being the informant), and I adjudged the said Daniel Graves for his said second offence to be imprisoned in the common gaol of the county

D. C.  
1910  
REX  
v.  
GRAVES.

\*Other points touched upon in the argument and authorities cited are referred to in the judgment of RIDDELL, J.

D. C.  
1910  
—  
REX  
v.  
GRAVES.  
—  
Riddell, J.

of Frontenac, at Kingston, in the said county of Frontenac, there to be kept without hard labour for the space of four calendar months; and also to pay to the said John Moreland the sum of \$7.95 for his costs in this behalf; and, if the said sum is not paid forthwith, then I order the said sum to be levied by distress and sale of the goods of the said Daniel Graves, and, in default of sufficient distress in that behalf, I adjudge the said Daniel Graves to be imprisoned without hard labour in the common gaol of the said county of Frontenac, at the said city, for the term of fifteen days, unless the said sum and charges of conveying the said Daniel Graves to the said common gaol are sooner paid."

A warrant was issued under the hand and seal of the magistrate, and Graves conveyed to the gaol at Kingston, where he still is.

A writ of *habeas corpus* (with *certiorari* in aid) was obtained on the 29th March, and a motion made for the discharge of the prisoner before my brother Sutherland, who (after reserving) on the 10th May gave a considered judgment, refusing the application.

The prisoner now appeals.

Objection was taken to our jurisdiction to entertain the appeal, notwithstanding *Rex v. Teasdale* (1910), 20 O.L.R. 382; and such cases as *Regina v. McAuley* (1887), 14 O.R. 643, and *Re Harper*, 23 O.R. 63, were cited. The argument proceeded subject to the objection.

Counsel for the appeal complains that several points urged below have been passed over without comment or consideration by my brother Sutherland. If such is the case, the learned Judge is perhaps not wholly at fault; I have found in my own case in many instances the utmost difficulty in understanding which of the numerous matters touched upon or referred to it is desired to press. However the fact may be, while it is the general rule that an appellant is not allowed to raise in the appellate Court anything which has not been raised below, the rule is not applied in cases affecting the liberty of the subject—and consequently every point is open to the appellant on this appeal as though we were the Court of first instance. As was pointed out in *Rex v. Leach* (1908), 17 O.L.R. 643, at p. 651, nothing should be overlooked in favour of the prisoner by the Court, though the notice of appeal may not definitely raise the point.

For the present I pass over the question of our jurisdiction to entertain the appeal—I shall deal *seriatim* with such of the objections urged as seem to be arguable.

First as to the warrant. The warrant reads: “Whereas Daniel Graves . . . was this day duly convicted before the undersigned, William Lawson, Police Magistrate in and for the county of Frontenac, for that he . . . on the 7th day of January, 1910, at the township of Portland, in said county, did sell liquor without the license therefor by law required, and, it appearing to me that the said Daniel Graves was previously, to wit, on the 8th day of August, 1908, at the city of Kingston, before me, the said William Lawson, duly convicted of having on the 14th day of July, 1908, at the said township of Portland, in said county, unlawfully sold liquor\* without the license therefor by law required, and I thereupon adjudged the offence of the said Daniel Graves hereinbefore firstly mentioned, to be his second offence against the Liquor License Act . . . and it was thereby further adjudged that the said Daniel Graves for his said second offence should be imprisoned in the common gaol of the said county . . . and there to be kept without hard labour for the space of four calendar months . . .” The warrant is directed “to all and any of the constables and other peace officers in the said county of Frontenac and to the keeper of the common gaol of the said county, at Kingston, in said county;” and the mandate is “to you, the said constables or any one of you, to take the said Daniel Graves and him safely convey to the said common gaol at Kingston . . . and there him deliver to the keeper thereof with this precept;” and “to you, the said keeper of the said common gaol, to receive the said Daniel Graves into your custody in the said common gaol, there to imprison him and to keep him without hard labour for the space of four calendar months. . . .”

At the point marked \* the word “liquor” does not appear on the same line with the contiguous words, but is above the line, and a caret (^) is inserted immediately below it, between the words “sold” and “without.” This is the chief objection (being No. 10 in the notice of motion) taken to the warrant, the argument being that the instrument was and is void for containing a material alteration.

Much learning upon the subject of alterations, erasures, or inter-

D. C.

1910

REX

v.

GRAVES.

Riddell, J.

D. C.  
1910  
—  
REX  
v.  
GRAVES,  
—  
Riddell, J.

lineations of documents is to be found in 1 Sm. L.C., 11th ed., p. 767, in *Master v. Miller*, and the annotations thereon. Most of this learning is not at all applicable here, and I do no more than refer to it.

In *Rex v. David Davis* (1836), 7 C. & P. 319, an indictment read "one ewe & sheep of the value of one pound;" immediately over the caret was interlined "of the price of one pound, and one." The prisoner's counsel took objection, and argued that the indictment must read "one ewe sheep of the value of," etc. But Patteson, J., overruled the objection; the prisoner was convicted, and transported for life. And those were days when indictments were indictments, and not mere statements in familiar language: and sheep-stealing was a serious matter. Indeed, this crime had been but four years before punishable with death; for capital punishment for sheep-stealing, having prevailed at the common law, and having been re-enacted in 1827 by 7 & 8 Geo. IV. ch. 29, sec. 25, had only been abolished in 1832 by 2 & 3 Wm. IV. ch. 62. See also *French v. State* (1859), 12 Ind. 670, *post*, on the same point.

Nor can it be successfully contended that the case of a warrant is different from that of an indictment. The indictment, being the production of a grand jury, passes from their foreman to the marshall of assize, also an officer of the law, in the same way as a warrant passes from the magistrate to the constable and the keeper of the gaol, all officers of the law.

The next objection to the warrant to be noticed is No. 1, that it does not shew that the magistrate or person alleged to have made the prior conviction had authority to do so. In the warrant itself the magistrate is described as "me, the said William Lawson;" and in the former part of the warrant is found the collocation of words, "the undersigned William Lawson, Police Magistrate in and for the county of Frontenac." So that it sufficiently appears that the convicting magistrate is the Police Magistrate for the county, and so had jurisdiction.

As objection was on the argument taken on a similar ground to the conviction, that may now be disposed of. The conviction begins by describing the convicting magistrate as "the undersigned William Lawson, Police Magistrate in and for the said county of Frontenac, and one of His Majesty's Justices of the Peace for the said county of Frontenac;" but, when it comes to



speak of the prior conviction, the words used are, "before me, the said William Lawson." It is contended that "the said William Lawson" may have been "one of His Majesty's Justices of the Peace for the said county," and acting as such upon the 8th August, 1908, when the prisoner was convicted.

*Hunt qui tam v. Shaver* (1895), 22 A.R. 202, decides that when a Police Magistrate "acts he acts not strictly as a Justice of the Peace, but as a Police Magistrate, and convictions made by him are made by him in that capacity:" *per* Hagarty, C.J.O., at p. 204. The Court, indeed, is there speaking of a Police Magistrate who says he acts and purports to act as "*ex officio* a Justice of the Peace," and in a matter in which he could act as a Justice of the Peace simply, *i.e.*, a Justice of the Peace, not being a Police Magistrate, could act; but it must be *à fortiori* if he is acting in a case in which he can have jurisdiction only as a Police Magistrate, and not simply as a Justice of the Peace. If, then, William Lawson was Police Magistrate on the 8th August, 1908, he was acting as Police Magistrate. From the state records it appears that, having been from 1905 a Justice of the Peace, he was on the 20th July, 1908, appointed Police Magistrate for the county of Frontenac.

Against this conclusion is urged the case of *Rex v. Collins*, Court of Appeal, not reported, 30th and 31st May, 1901. In that case it appears that the prisoner was charged before Alexander Logan, who was in fact Police Magistrate for the town of Niagara Falls, but who sat at the village of Fort Erie, upon a charge of unlawfully circulating a letter or circular advertising or offering for sale a counterfeit bill. Mr. Logan convicted, but the conviction read: "The prisoner being charged before me, the undersigned Justice of the Peace for said county, and consenting," etc., and was under the hand and seal of "Alexander Logan, Justice of the Peace, Welland county." Falconbridge, C.J., refused to discharge the prisoner on *habeas corpus*, but, on appeal to the Court of Appeal, the appeal was allowed, Armour, C.J.O., saying, according to the newspaper report (which it seems alone is available): "As a Justice of the Peace for the county, the convicting magistrate had no jurisdiction to try the offence, and, as jurisdiction must always appear on the face of summary proceedings, the conviction did not support the commitment, and the prisoner must, therefore, be discharged."

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

D. C.  
 1910  
 REX  
 v.  
 GRAVES.  
 —  
 Riddell, J.

If in the present instance the magistrate had described himself simply as "a Justice of the Peace in and for the county of Frontenac," the *Collins* case would be applicable; but such is not the case. He described himself as Police Magistrate, etc., and I think the *Hunt* case is authority not at all affected by *Rex v. Collins*. Nor is *Webb v. Ross* (1859), 4 H. & N. 111, in point. There a gentleman, who was a Justice of the Peace for W. and S., acted and purported to act as a Justice of the Peace for W.; and it was held that a search warrant thus issued by him would not justify any one acting under it as though it had been made by the same person as Justice of the Peace for S.

The objection that the warrant does not state the place at which the conviction for the second offence took place is answered by saying that the form L. has been followed in this regard also.

Then (No. 2) it is contended that the warrant is bad because it does not as to material points recite the conviction actually made on the 4th February, 1910. The offence is described exactly as in form schedule F (3), except that the word "unlawfully" is left out. Section 72 provides for the conviction of a "person who sells . . . spirituous, fermented or manufactured liquors . . . or intoxicating liquors . . . without the license therefor by law required:" this section does not contain the word "unlawfully," nor does sec. 49 (1), which makes the sale unlawful except in certain specified cases. But the new sec. 717 of the Code, introduced by 8 & 9 Edw. VII. ch. 9 (sched. at p. 110, top), provides that the exception or proviso need not be mentioned in the information or disproved by the complainant. Every sale of "liquor" without a license is unlawful by sec. 49, *primâ facie*; and the section imposing the penalty, sec. 72, so imposes it on any person selling liquor of the kinds mentioned, without the license, etc., on conviction thereof, *i.e.*, of selling the liquor without the license, etc., not of unlawfully selling, etc. I think it plain that form F (3) shews that the word "liquor" is sufficiently descriptive; and sec. 72, that the word "unlawfully" need not be used.

Then it is argued that the warrant is not addressed to the officer or class of officers by whom it is to be executed—and *Russell v. Hubbard* (1849), 6 Barb. S.C. N.Y. 654, is cited. There the warrant was not addressed at all, the statute requiring it "to be directed to such officers, or to such of them as may be necessary" (the class of

officer to execute the warrant having been previously set out); the Court held that the warrant was bad, and did not protect the defendant, who was a constable, and so within the class. That a warrant not directed to any particular officer or person is bad at the common law may be admitted: *Regina v. Wyatt* (1706), 2 Ld. Raym. 1189; *The King v. Weir* (1823), 1 B. & C. 288; Bac. Abr. "Constable," D—"for so long as the warrant is not directed, it is but a recital of the conviction and judgment, and is not valid as a process." "But a warrant may also be directed to a person, not by his name, as an individual, but by the description of his official character:" 6 Pet. Abr. 132, 133; *The King v. Weir*, 1 B. & C. 288, *per* Bayley, J.

We need not trouble about the constables—the warrant is produced by the keeper of the common gaol, whose prisoner the applicant is. The keeper of the common gaol is described by "his official character," the warrant is addressed to him as such, and is consequently valid to justify him in detaining the prisoner, which is all we are concerned with. If and when an action is brought against the constable, the case of the constable will be dealt with. Moreover, the warrant is in the form given in schedule L to the statute R.S.O. 1897, ch. 245, at p. 3031, and that form the Legislature has declared to be sufficient: sec. 103.

There is nothing in this objection. The warrant not being obnoxious to objection, the cases of *The King v. Inhabitants of Austrey*, 6 M. & S. 319, 326, and *Howard v. Gosset* (1845), 10 Q.B. 359, have no application.

In respect of the conviction, there are many complaints not all set out specifically, but all perhaps generally set out in the notice of motion.

The chief objection, we are told, is that there are interlineations and erasures in material parts of the conviction—and certainly that is abundantly true—there are many interlineations and erasures (in the sense in which the word "erasure" is interpreted in *Williams v. Clough* (1834), 1 A. & E. 376). The document is far from being a pretty or a creditable production. I shall enumerate all the interlineations, etc., to test the value of the complaint. In the caption the words "City of Kingston" are scored out—then in the record the words "James Macalister Farrell" are scored out, and "William Lawson" written above—"City of Kingston" scored out and "County of

D. C.  
1910  
REX  
v.  
GRAVES,  
Riddell, J.

D. C.  
 1910  
 REX  
 v.  
 GRAVES.  
 Riddell, J.

Frontenac" interlined. In stating the locality of the offence "said City of Kingston" scored out, and "Township of Portland in said County" interlined. "Without the license therefor" has the words "required by law required" following, but the first "required" is scored out. "The offence of the said Daniel Graves hereinbefore" is followed by a caret, and the word "firstly" interlined; then the word "mentioned" follows. "And I adjudge" has a caret and the letter d interlined. "For said offence to forfeit and pay the sum of" scored out, and the words "for his said second offence to be," at the end of the preceding line, followed by "imprisoned in the common gaol of the County of Frontenac" interlined, followed by the words "in the said County of Frontenac there," and interlined thereafter "to be kept without hard labour for the space of four calendar months," the words in the following line "dollars to be paid and applied according to law" being scored out. Then follow "and if the said" ("several" scored out) "sum" the "s" sign of the plural and "are" scored out, a caret with "is" interlined. "I adjudge the said . . . to be imprisoned" scored out, and "then I order the said sum to be levied by distress and sale of the goods and chattels of the said Daniel Graves and in default of sufficient distress in that behalf, I adjudge the said Daniel Graves to be imprisoned without hard labour" interlined—"and there to be kept at hard labour" scored out—"unless the said sum" followed by the "s" scored out "and" followed by "the costs and" scored out. Then the document is signed by "William Lawson, Police Magistrate in and for the said," followed by "City of Kingston" scored out and "County of Frontenac" inserted. Of course the Police Magistrate has procured a form used by the Police Magistrate of Kingston for another kind of conviction, and used it for the present purpose.

There can be no doubt that a deed is void if altered by grantee after delivery in a material point—the rule in *Pigot's Case* (1614), 11 Rep. 26b, that any alteration so made voids the deed, must now, since *Aldous v. Cornwell* (1868), L.R. 3 Q.B. 573, be modified so as to apply only to material alterations: *Bishop of Crediton v. Bishop of Exeter*, [1905] 2 Ch. 455. But the mere fact of interlineations or alterations so appearing in a material part does not of itself shew the deed to be invalid. In Co. Litt. 225b it is said: "Of ancient time if the deed appeared to be rased (razed) or



interlined in places material, the Judges adjudged upon their view, the deed to be void. But of latter time the Judges left that to the jurors to try whether the rasing or interlining were before the delivery." See *Doctor Leyfield's Case* (1611), 10 Rep. 92b (2).

And it was early laid down that, if the contrary is not proved, an interlining is presumed to have been made at or before the time of making the deed—in which case not only is the deed not invalidated but the interlineation is a part of it—it may be the most important part. Thus in *Trowel v. Castle* (1661), 1 Keb. pl. 62, at p. 22, it is said by the Court of King's Bench: "5. An interlineation without any thing appearing against it will be presumed to be at the time of the making of the deed, and not after." *Miller v. Manwaring* (1635), Cro. Car. 397, at p. 399, is not opposed, as there the erasure in the deed was "after the sealing and delivery thereof."

I do not find the doctrine questioned, and in *Fitzgerald v. Fauconberge* (1751), Fitzg. 207, at p. 214, Reynolds, L.C.B., says: "There is no proof when these words were interlined . . . therefore I must look at them as if they had been originally incorporated in the body of the deed." So in *Doe dem. Tatum v. Côtmore* (1851), 16 Q.B. 745, Lord Campbell, giving the judgment of the Court, lays down the same rule. In that case, however, the alterations and erasures were not in material parts. But the Court makes no distinction in that regard. The distinction was there made in respect of bills of exchange and promissory notes.

The rule as to such instruments, it is clear, came from the provisions of the English Stamp Acts. It seems to have appeared first in *Johnson v. Marlborough* (1818), 2 Stark. 313—then came *Bishop v. Chambre* (1827), 3 C. & P. 55; *Leykariff v. Ashford* (1827), 12 Moo. 281; *Taylor v. Mosely* (1833), 6 C. & P. 273; *Sibley v. Fisher* (1837), 7 A. & E. 444; and many others.

In *Beaman v. Russell* (1848), 20 Vt. 205, the law is discussed with much ability, and the conclusion arrived at is that at the common law as introduced into the American colonies an alteration of a written instrument, if nothing appears to the contrary, should be presumed to have been made at the time of its execution.

D. C.

1910

REX

v.

GRAVES.

Riddell, J.

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

In *Bailey v. Taylor* (1836), 11 Conn. 531, the law is laid down in the same way. Williams, C.J., at p. 533, says: "In ancient times, when few could write, and when the business which required writing was done by those who were skilful, such a rule as the defendant claims, might not have been greatly felt in its operation; and we find, by the ancient decisions, where a deed was suspicious, by rasure or avulsion of the seal, the party, on oyer of the deed, might demur, and put it into the judgment of Court, or plead *non est factum*: Co. Litt. 35, n. 7. The Court might thus decide, upon inspection of a deed, that it was void. Such a principle, however, could not long be supported; and of latter times, says Lord Coke, the Judges have left it to the jurors to try whether the rasure or interlining was before the delivery."

So far as these are decisions upon promissory notes, we need not regard them, but they are valuable as shewing the view of the common law taken by common law Courts.

*French v. State*, 12 Ind. 670, is a decision like that in *Rex v. David Davis*, 7 C. & P. 319, above referred to. The prisoner had asked the trial Court to quash the indictment against him; that Court refused, and the prisoner, who had been found guilty of murder, appealed to the Supreme Court of the State of Indiana. This Court says, Perkins, J., giving the judgment, p. 671: "The objection to the indictment was that it contained interlineations. If the indictment was conveniently legible, it would not be bad because it contained interlineations; and, in the absence of anything appearing upon the face of a written instrument, or being shewn extrinsically, tending to prove that interlineations were made subsequently to the execution of the instrument, it will be presumed they were made before or at its execution."

We need not discuss the case of wills, in which the presumption is the other way, or the case of bills of exchange, now covered by the Bills of Exchange Act, sec. 142 (Falconbridge, pp. 582, *sqq.*), or affidavits, covered by Con. Rule 520. I can see no reason for refusing to apply the ordinary rule to convictions as to warrants and indictments—and think the conviction must be read with the interlineations and erasures as they appear.

The next objection to be noticed is that, after the adjudication of guilt, the prisoner is ordered to pay costs. (An objection based upon the punctuation disappears upon an examination of the

original document, as there is no stop between the two adjudications.)

The Criminal Code, sec. 735, provides that "in every case of a summary conviction, or of an order made by a Justice, such Justice may, in his discretion, award and order in and by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said Justice seem reasonable . . . ;" and R.S.O. 1897, ch. 90, sec. 4, which is made expressly applicable by R.S.O. 1897, ch. 245, sec. 98, contains the same provisions. The applicability of the Criminal Code (so far as it is made applicable through R.S.O. 1897, ch. 90, sec. 2, if it ever had been doubtful) is made clear by 9 Edw. VII. ch. 82, sec. 24 (4): "Nothing in this Act contained shall prevent the operation of any provision of the Criminal Code or of the Ontario Summary Convictions Act which would otherwise apply." "This Act" of course does not mean 9 Edw. VII. ch. 82, but the Act R.S.O. 1897, ch. 245, with all its amendments. In view of the provisions of R.S.O. 1897, ch. 90, sec. 4, I do not discuss the applicability of sec. 735 of the Code here.

Section 738 of the Code provides that whenever there is no penalty to be recovered the "costs shall be recoverable by distress and sale of goods of the party, and in default of distress, by imprisonment . . . for any term not exceeding one month." This is certainly applicable under R.S.O. 1897, ch. 90, sec. 2 (1). So far, then, as concerns the costs, the award, method of realising the same, and penalty in case of want of sufficient distress, the proceedings are wholly warranted by the Code. There is, however, no specific authority given to direct imprisonment unless the charges of conveying the prisoner to the gaol are sooner paid, as is done in this conviction. Nor can, I think, this be called a case where "an order requires the payment of a sum of money," so that sec. 739 (as amended in 8 & 9 Edw. VII. ch. 9, see p. 110) would apply—the case of costs is set off by itself, and the utmost term of imprisonment in default of paying costs is set at one month, whereas in the case of "an order" requiring "the payment of a sum of money" the limit is three months. Nor does sec. 89 of the Liquor License Act apply, as that section applies only to "cases of conviction under this Act, where the Justice or Justices are authorised to adjudge that a penalty in money, or a penalty in money and costs, be paid by the defendant:" and it is to such a case that form schedule I. applies.

D. C.

1910

REX

v.

GRAVES.

Riddell, J.

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

In this case of second offence imprisonment is the only penalty: R.S.O. 1897, ch. 245, sec. 72; and that of course is not a penalty in money.

The Ontario Act, R.S.O. 1897, ch. 90, does not help, sec. 4 (4) specifically providing, "Where there is no penalty to be recovered . . . the costs shall be recoverable only by distress and sale of the goods and chattels of the party." Form J. does not contain any provision for costs at all.

Mr. Justice Sutherland cites *Rex v. Degan*, 17 O.L.R. 366, as authority allowing an amendment to be made. There there were two convictions, each as for a first offence, with a penalty of \$100 and costs or three months' imprisonment in each case. The costs of conveying to gaol were also awarded, but these "were not properly indicated either in the commitments or sufficiently identified by indorsement upon them." The case therefore came within sec. 89 (1) of the Liquor License Act, and "the costs and charges of . . . conveying the defendant to prison" could legally be imposed. Consequently the conviction came within sec. 105, as "no greater penalty or punishment is imposed than is authorised by" the Act. My brother Teetzel was justified in applying sec. 105 and refusing to discharge the prisoner and in amending the conviction under sec. 105 (2).

Here, however, the award of imprisonment, unless the costs of conveying to prison are paid, is a "greater penalty" and "punishment than is authorised by this Act;" and sec. 105 (1) does not apply; and it is only when the "conviction is sufficient and valid under this section or otherwise" that such conviction is to be affirmed and the Court may amend it.

*Regina v. MacKenzie* (1884), 6 O.R. 165, also a liquor case, is in point, as is *Regina v. Lynch* (1886), 12 O.R. 372. In the latter case imprisonment was authorised by the Act for non-payment of a penalty; the magistrate adjudged the penalty, distress of goods to levy it, and, in default, imprisonment. The Court held, following *Regina v. Brady* (1886), 12 O.R. 358, that such an adjudication was invalid in law and an excess of jurisdiction; and also that the excess appeared upon the face of the conviction. The Court (Wilson, C.J.) further held that there was no power to amend under 49 Vict. ch. 49, secs. 2, 3 (D.), which gave such power "provided that the



punishment imposed is not in excess of that which might have been lawfully imposed for the said offence."

In the case of *Rex v. Ackers* (1910), 1 O.W.N. 780, *ante* 187, there was no excess of punishment.

It remains to discover whether the Criminal Code is of assistance: sec. 1120 is not, as that refers to indictable offences only. But sec. 1124 provides that "no conviction or order made by any Justice . . . shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, if the Court or Judge . . . is satisfied that an offence of the nature described in the conviction . . . has been committed . . . and that the punishment imposed is not in excess of that which might have been lawfully imposed . . . Provided that the Court or Judge, where so satisfied, shall, even if the punishment imposed . . . is in excess of that which might lawfully have been imposed, . . . have the like powers" as are given in sec. 754 in an appeal under sec. 749. Section 754 directs the Court in case of such an appeal, "notwithstanding any defect in such conviction . . . and notwithstanding that the punishment imposed or the order may be in excess of that which might lawfully have been imposed or made, hear and determine the charge . . . upon the merits, and may . . . make such . . . conviction or order . . . as the Court thinks just, and may . . . exercise any power which the Justice . . . might have exercised . . ."

If the Criminal Code, in the sections about to be mentioned, applies to the present case, I am of opinion that the present case comes within sec. 1124. The prisoner must fail in his attack upon the warrant; and must, to succeed, prove that the conviction is bad. This he can only do upon bringing up the conviction by *certiorari*, and, upon the conviction so being removed by *certiorari*, the power attaches as the section sets it out.

If the conviction is in other respects good, we should exercise the power (if we have it) given by this section and sec. 754, and make a proper conviction.

I do not need to pass upon the applicability of these sections, as another objection, in my mind, is fatal and cannot be set right.

So far as the facts of the later offence are concerned, there can be no doubt that the prisoner was righteously convicted. But an objection is taken to the proof of the former conviction. After

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

D. C.  
1910  
REN  
v.  
GRAVES.  
Riddell, J.

the adjudication of the offence (charged as a second offence) against the defendant, witnesses were called: Ayearst, a provincial inspector, who swears that he was present "in this room 81 Princess street, Kingston, when Daniel Graves, hotel-keeper, Harrowsmith, of the township of Portland, in the county of Frontenac, was convicted before William Lawson, Police Magistrate of the county of Frontenac, of selling intoxicating liquor at his hotel in Harrowsmith in said township without a license on the 14th day of July, 1908;" Robert Smith, to much the same effect; and John Moreland also, who makes the offence "having unlawfully sold liquor without a license." Moreland, as we have seen, was the complainant on the present prosecution.

It is contended that the magistrate had no jurisdiction to take any evidence at all upon the prior conviction until he had (under sec. 101 (1) of the Liquor License Act) asked the accused "whether he was so previously convicted as alleged in the information," and the accused had denied or stood mute of malice or had not answered directly to the question.

*Rex v. Nurse* (1904), 7 O.L.R. 418, is cited as an authority for this contention. There the magistrate had admitted evidence of previous convictions before convicting of the later. Upon motion to quash the conviction, the Court pointed out that the language was: "The magistrate shall *in the first instance* inquire concerning the subsequent offence only, and if the accused be found guilty thereof, *he shall then, and not before*, be asked whether he was so previously convicted . . .;" and the Court held that "the enactment is so distinctly and emphatically framed that it cannot be evaded under the guise of no harm arising from disregarding its precise terms:" p. 421.

The language "then, and not before," is identical with that of the Canada Temperance Act, 1878, sec. 115, which was construed in the same way in *Regina v. Edgar* (1887), 15 O.R. 142, by Rose, J., who said the language was peremptory, and "to give the magistrate jurisdiction to inquire as to a previous conviction he must first find the accused guilty of the alleged subsequent offence:" p. 143. This case was followed by the County Court Judge of Haldimand county: *Rex v. Dealtry* (1903), 40 C.L.J. 38, in a case under the Liquor License Act.

Armour, C.J., with whom Street, J., concurred, held in *Regina*.

*v. Brown* (1888), 16 O.R. 41, that the provisions of sec. 115 of the Canada Temperance Act were merely directory.

This was the state of the decisions when the Legislature in 1909 interfered and enacted by sec. 20 of 9 Edw. VII. ch. 82, that the words "and not before" should be deleted. Some end must have been aimed at and some result must have been intended to be effected by this amendment; and it seems to me that the only object there could be was to make the provision directory, instead of imperative and peremptory. It is not necessary to consider how the case would have stood had the language been originally as it now stands; and to point out that the words "and not before" are not to be found in the latter part of the sub-section.

In *Rex v. Teasdale*, 20 O.L.R. 382, the change in the legislation was not brought to the attention of the Court.

Nor does the memorandum, "I am satisfied that the defendant Daniel Graves was previously convicted of a similar offence," made by the magistrate, prevent the formal conviction being fully effective, even if we did not apply the section of the Code already referred to.

Nor is there anything in the objection that the prosecutor, being a person interested, was called as a witness: the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 3, provides that "a person shall not be incompetent to give evidence by reason of interest . . . ;" and to the like effect is the Evidence Act, R.S.O. 1897, ch. 73, sec. 2.

The next objection is, in my view, more formidable. The conviction was attempted to be proved by persons present in Court when the alleged conviction took place.

The Act, sec. 101 (2), says: "The number of such previous convictions shall be proveable by the production of a certificate under the hand of the convicting Justices or Police Magistrate, or of the Clerk of the Peace, without proof of his signature or official character, or by other satisfactory evidence."

We had occasion to consider this section in *Rex v. Leach*, 17 O.L.R. 643, in another view.

There can be no doubt that the magistrate cannot proceed upon his own knowledge, or upon anything but evidence.

In order to prove a trial at all, the record must be produced: *Rex v. Legros* (1908), 17 O.L.R. 425; *Rex v. Drummond* (1905),

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

D. C.

1910

REX

v.

GRAVES.

Riddell, J.

10 O.L.R. 546; even in a Police Magistrate's case: *Rex v. Farrell* (1909), 20 O.L.R. 182, the latest deliverance of our Court of Appeal. And this is the rule even in trials for perjury, where it is immaterial whether the witness accused of perjury was a competent witness or not, and whether his evidence was material or not, or admissible or not. At the common law it was necessary to produce the original record or a certified copy. By 7 & 8 Geo. IV. ch. 28, sec. 11, this was modified in England, and a certificate together with proof of identity made sufficient: our first Act seems to have been (1841) 4 & 5 Vict. ch. 24, sec. 30. It is unnecessary to trace the history of legislation in England, through Lord Brougham's Act (1851), 14 & 15 Vict. ch. 99, to 34 & 35 Vict. ch. 112, sec. 18; or our own, culminating in the Code, R.S.C. 1906, ch. 146, sec. 982; R.S.C. 1906, ch. 145, sec. 12 (2); and R.S.O. 1897, ch. 73, sec. 19 (1).

No other method is specifically provided here for the proof of the previous conviction than the production of a certificate. The general provision "by other satisfactory evidence" does not, I think, go so far as to make effective the oral evidence of bystanders as proving a conviction. The magistrate is bound by statute, sec. 727, to draw up a conviction—if one has been drawn up, it may be produced or a certificate of it given—if not, one may be drawn up from the minute or memorandum or perhaps without minute or memorandum, if the magistrate has neglected to make one. Then the evidence, statutory or otherwise, may be given.

If the case were like *Rex v. Yaldon* (1908), 17 O.L.R. 179, it would be different. There there was no information, and, as (apparently) the accused was acquitted, no record of any kind was or could be in existence, and the Court held that "there being no information or other formal record, the charge and the proceedings thereon, so far as material to be shewn, were proved in the only way in which they were capable of being proved:" p. 182. In that case there was no conviction at all, and all that was necessary to prove in respect of the occasion of the alleged perjury was that it was a judicial proceeding before a person acting as a Court, whether duly constituted or not (Code, sec. 171): and the case is no authority for allowing such evidence to prove a conviction.

I am much impressed with the remarks of Mr. Justice Meredith in the *Farrell* case, 20 O.L.R. at p. 190, that such evidence as was there offered of the proceedings was evidence, at least if something else had



been proved, that is, it would be secondary evidence if not primary evidence. The logical consequence of following this view of the matter would be to say here that, as no objection was taken by the defendant at the time to this evidence, it should now be held sufficient. But, in consideration of the view of the majority of the Court, I think it proper to hold that the evidence was not sufficient. And, *à fortiori*, it was not "satisfactory."

I am, therefore, of opinion that the previous conviction was not proved, and that the conviction for a second offence cannot stand.

We cannot remit the case under sec. 105 (3) (9 Edw. VII. ch. 82, sec. 32); this only applies where evidence has been rejected. Neither can proceedings be taken under sec. 101 (5)—the previous conviction has not been set aside, etc.; it has only not been proved. We may, however, if we have any jurisdiction, proceed under sec. 1124 of the Code, and make use of the power given under sec. 754 and "hear and determine the charge . . . upon the merits, and may . . . make such conviction . . . in the matter as the Court thinks just . . . and may make such order as to costs . . . as" we "think fit." The evidence is plain and clear that the offence charged as a second offence was committed; and, if the Code applies, there should be a conviction as of a first offence, following form schedule I. (penalty \$100 and costs), with the costs as in the present conviction payable and enforceable as in schedule I., the imprisonment in default to be imprisonment for three months without hard labour. But, as I have said, the decision upon this point becomes immaterial in the view I take of our jurisdiction.

The remaining question is as to the right of the Divisional Court to entertain an appeal from the Judge in Chambers.

Counsel for the Crown relies upon *Re Harper*, 23 O.R. 63, a judgment of the Common Pleas Divisional Court, which was not cited upon the argument in *Rex v. Teasdale*, 20 O.L.R. 382, which is relied upon by the appellant.

At the time the *Harper* case was decided, the Act in force was R.S.O. 1887, ch. 70; the Act now in force is 9 Edw. VII. ch. 51, repealing since the 13th April, 1909, R.S.O. 1897, ch. 83, which corresponds to R.S.O. 1887, ch. 70—the provisions are, however, not materially different. The writ may be made returnable either before any Judge of the High Court or a Divisional Court of the High Court in the first instance. Then (sec. 8 (1)), if the person

D. C.  
1910  
REX  
v.  
GRAVES.  
—  
Riddell, J.

D. C.  
 1910  
 REX  
 v.  
 GRAVES.  
 —  
 Riddell, J.

obtaining his writ "is brought before the Court or Judge . . . and is remanded into custody upon the original order or warrant . . . or by virtue of any . . . order . . . of such Court or Judge, such person may appeal from the decision . . . of the Court or Judge to the Court of Appeal . . ." The Judges are authorised to make such rules of practice in reference to the proceedings on writs of *habeas corpus* as may seem necessary or expedient.

The Ontario Judicature Act, sec. 67, Con. Rule 117, gives the Divisional Court jurisdiction in "cases of *habeas corpus* in which a Judge directs that [a motion for a writ or] the writ be made returnable before a Divisional Court." (The words in brackets are not in the statute, *i.e.*, in the Ontario Judicature Act: they do in substance appear in the Act of 1909, ch. 51, as sec. 2 (2), being taken from Con. Rule 117, and adopted by the Legislature): this provision appeared in the first of our Judicature Acts (1881), 44 Vict. ch. 5, Order 54, Rule 471, p. 135, and has since been continued.

In the *Harper* case the previous case of *Re Hall* (1883), 8 A.R. 135, was mentioned and discussed. In *Re Hall* the state of the legislation was different—the Act of 1866, 29 & 30 Vict. ch. 45, sec. 1 (C.), provided that the writ should be "returnable immediately before the person . . . awarding the same or before any Judge in Chambers for the time being." The statute did not take away the right of the Court *en banc* to issue writs of *habeas corpus*. By sec. 6 it was provided that where the person "shall be brought before the Court in term upon a writ of *habeas corpus* and shall be remanded to custody again . . ." an appeal will lie to the Court of Error and Appeal, but there was no provision for an appeal from a Judge in Chambers. Mr. Justice Patterson, pp. 147, 148, came to the conclusion that it could not be supposed that a right of appeal would be given (a step in advance of the Imperial Act) from the decision of the full Court and none from a single Judge, and, having regard to this consideration, and to the use of the phrase "Judge in Chambers" to designate the person who may proceed upon the writ, he thought that a prisoner whose motion upon a writ of *habeas corpus* was heard before a single Judge should have the same right to appeal as a suitor in an ordinary case, and, as the Court of Appeal was not opened to him, that appeal must be to the Court in term.

In *Re Harper* the Divisional Court point out that "upon the revision of 1887, R.S.O. ch. 70, the provisions of the Act were altered, probably in consequence of the opinion expressed by Mr. Justice Patterson, for we find that by sec. 1 a writ may be returnable before 'the Judge so awarding the same or before the Judge in Chambers for the time being, or before a Divisional Court;' and by sec. 6 of that Act, an appeal is given from the decision or judgment of the said Court or Judge to the Court of Appeal;" and say further: "It is clear, therefore . . . that the right of appeal given by the statute must be exercised in the manner given by the statute; and there is no appeal from the judgment of a Judge in Chambers, otherwise than to the Court of Appeal."

See also what is said about the change in the statute by Armour, C.J., in *Taylor v. Scott* (1899), 30 O.R. 475, at p. 481, *ad fin.*

In *Rex v. Lowery* (1907), 15 O.L.R. 182, an appeal was taken from the order of Falconbridge, C.J., making it a term of the discharge of the defendant that no action should be brought. The Chancellor says, p. 183: "As the case is shaped the proceedings appear to be of a civil, and not of a criminal character, and the particular direction complained of is one relating to civil rights, and I think we have jurisdiction to declare that the term of the order of discharge complained of is nugatory." Magee and Mabee, J.J., concurred. In this case the prisoner "was discharged" (*i.e.*, by Falconbridge, C.J.), "under *habeas corpus*, because no offence was disclosed in the papers . . . and the Judge *also* ordered that he should bring no action against the magistrate or other person in respect of the conviction." It will be seen that it was not the case of an appeal where the person confined is remanded into custody, which is the case provided for specifically by the statute; and, accordingly, it is no authority for the proposition that where a method of appeal is expressly provided another method may be followed. Nor does it overrule or purport to overrule *Re Harper*, which indeed does not seem to have been cited. It must also be remembered that this case was decided in 1907, and therefore before the change effected on the 4th April, 1908, in Con. Rule 777.

In *Regina v. McAuley*, 14 O.R. 643, Wilson, C.J., had granted a release to the prisoner on *habeas corpus*, but had, so far as he had the power, directed that no action should be brought in respect of the imprisonment, and Armour, J., in quashing the conviction, made a

D. C.  
1910  
—  
REX  
v.  
GRAVES.  
—  
Riddell, J.

D. C.  
1910  
—  
REX  
v.  
GRAVES.  
—  
Riddell, J.

similar order. An appeal from so much of these orders as "imposed a condition that no action of trespass should be brought" (p. 655) was quashed by the Common Pleas Divisional Court. While this case was cited in the *Lowery* case, it is not noticed in the reasons for the decision, probably because the *McAuley* case went off, not on the provisions of the Habeas Corpus Act, but upon the practice under the then existing Rules.

The *Teasdale* case is destitute of authority and opposed to a Divisional Court decision, and, as I view the law, it will be necessary for us upon this motion to decide the law for ourselves.

The *Harper* case is based upon the principle, real or supposed, that a right of appeal does not exist in the nature of things, that it must be given by express enactment, and, when given by express enactment, the mode prescribed by the statute must be followed: the *Teasdale* case, if I rightly read it, depends upon two arguments: (1) that the legislation does not in express terms forbid an appeal; and (2) under the Liquor License Act, providing an appeal, it is provided that "no such appeal" (i.e., appeal to the Court of Appeal) "shall lie from the judgment of a single Judge or from the judgment of the Court if the Court is unanimous unless . . . the Attorney-General . . . certifies . . . ;" and it is said, p. 388: "That seems to imply that a party may as of right and in the ordinary case go from a single Judge to a Divisional Court."

I am not able to follow the latter reason. By the Habeas Corpus Act a writ of *habeas corpus* may be returnable before a Judge in Chambers or before a Divisional Court in the first instance; and in either case, if the result is unfavourable to the prisoner, an appeal is given to the Court of Appeal. By the Liquor License Act, if the motion be heard by a single Judge, an appeal cannot be taken without the certificate of the Attorney-General—if by a Divisional Court, unless the members of the Court differ in opinion, the same result follows; so that, if the applicant fails wholly to convince the tribunal before whom he has had his writ made returnable, he must abide by the result, unless the Attorney-General helps him; but, if he succeeds in convincing one Judge of the three who may hear his case, he may appeal of right. I cannot see that there is an implication of any other appeal, even if an appeal can be given by implication.

Nor, as I think, is the case advanced by Con. Rule 777, as it now



reads (the note to the report in 20 O.L.R. at p. 387 is incorrect). The Rule now reads: "(1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of an action may appeal therefrom to a Divisional Court without leave . . . (2) Except in cases in which a right of appeal is specially conferred by statute or by Rule of Court, no appeal shall lie from any judgment or order of a Judge in Chambers which does not finally dispose of the action unless by special leave of a Judge . . . ." The old Rule was as set out in the report at the page already referred to.

Under the present Rule it is not sufficient that a "matter" be finally disposed of, to avoid the necessity for leave being obtained: and consequently it has been consistently held since the passing of this Rule that an appeal from a refusal to quash a conviction will not be entertained without leave having been first obtained. *Rex v. Van Norman* (1909), 19 O.L.R. 447, at p. 456, is an instance.

Although the Divisional Court retained jurisdiction in *certiorari*, for reasons set out by the Chancellor in *Regina v. Fee* (1887), 13 O.R. 590, at p. 592, a proceeding by way of *certiorari* is not an "action" within the meaning of the Ontario Judicature Act; and Con. Rule 777 (1) does not therefore apply.

The statute R.S.O. 1897, ch. 51, sec. 2 (3), defines "action" as a "civil proceeding commenced by a writ or in such other manner as may be prescribed by Rules of Court;" and in the Rules, Con. Rule 6 (e), it is provided that "'action' as defined by sec. 2 of the Judicature Act, 1895, shall include garnishee proceedings under Rules 911 to 921 and proceedings for relief by interpleader under Rules 1102 to 1128."

While Con. Rule 4, in the use of the expression "criminal matters," has been held to mean "such matters as are beyond provincial legislative authority:" *Copeland-Chatterson Co. v. Business Systems Co.* (1908), 16 O.L.R. 481, followed in *Rex v. Leach*, 17 O.L.R. 643; and consequently we held that the Rules as to costs applied in proceedings in *habeas corpus*; it is to be observed that in the original Rule 4, after the words "criminal matters" appeared the words "or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas Divisions." So it was obvious that a distinction was made between "criminal matters" and proceedings on the Crown side of the common law Courts. The ex-

D. C.  
1910  
REX  
v.  
GRAVES.  
—  
Riddell, J.

D. C.  
 1910  
 REX  
 v.  
 GRAVES.  
 Riddell, J.

pression in the Act "a civil proceeding commenced by writ" excludes proceedings on the Crown side. The definition of "action" in the original Ontario Judicature Act of 1881, 44 Vict. ch. 5, sec. 91, is taken, *totidem verbis*, from the English Act of 1873, sec. 100; and the omission, in 1895, of the words "and shall not include a criminal proceeding by the Crown" has not affected the meaning of the remaining words. There can be no doubt as to the meaning in England, and, in my view, as little here. Consequently, proceedings on the Crown side, though begun by writ, as *certiorari*, *habeas corpus*, and the like, are excluded from the class denominated "action" in the Ontario Judicature Act. I am not at all suggesting that such proceedings are not subject to the Consolidated Rules, so far as they can be made applicable, but simply that they do not come within the meaning of the word "action" in the Rules.

No leave having been obtained and no "action" having been disposed of, this appeal will not lie unless a right of appeal is specially conferred by statute or Rule of Court. No other Rule of Court is to be found conferring such right of appeal.

As to the statute, it will be convenient to consider the propositions of the Crown.

The rule is laid down by Abbott, C.J. (afterwards Lord Tenterden, C.J.) in the case of *The King v. Hanson* (1821); 4 B. & Ald. 519, at p. 521, as follows: "The rule of law is, that although a *certiorari* lies, unless expressly taken away, yet an appeal does not lie, unless expressly given by statute." This was followed in *The Queen v. Stock* (1838), 8 A. & E. 405, an extraordinary case, in which Lord Denman, C.J., says of the question whether an appeal lay under a statute: "I confess I am strongly of the opinion that it was intended; but, on the whole, I cannot say that it is done. . . . A right of appeal cannot be implied, but must be given by express words." Little-dale, J., says: "Perhaps, if a power of appeal could be implied, it would be so here; but Abbott, C.J., says . . . that that power cannot be given by implication." Patteson, J., says: "The dictum in *Rex v. Hanson*, that a *certiorari* lies unless expressly taken away, but an appeal does not lie unless expressly given, seems to be clear law." Williams, J.: "There are innumerable instances where an appeal is given in terms; but no case has been mentioned in which it has been given by implication. . . . An appeal seems to have been contemplated; but it should have been expressly given."

Bramwell, L.J., in *Sandback Charity Trustees v. North Staffordshire R.W. Co.* (1877), 3 Q.B.D. 1 (C.A.), at p. 4, says: "An appeal does not exist in the nature of things: a right to appeal . . . must be given by express enactment."

The leading case is *Attorney-General v. Sillem* (1863), 2 H. & C. 431, 581, S.C., in Dom. Proc. (1864). 10 H.L.C. 704, arising out of the seizure of the "Alexandra" intended for the Confederate States during the American civil war. An information by the Attorney-General was tried before the Chief Baron, Pollock, when a verdict went for the defendants. A motion was made in term for a rule *nisi* for a new trial; next day the Court of Exchequer passed new Rules which, it was contended, gave a right to appeal, and the next day granted the rule *nisi*. The Court on the argument of the rule evenly divided, the junior Baron withdrew his judgment, and the rule *nisi* was discharged. The Crown appealed to the Exchequer Chamber, and four Judges against three decided that the Act did not give the Court of Exchequer power to give an appeal in this revenue side case. In the House of Lords, Lords Westbury, C., St. Leonards, Chelmsford, and Kingsdown, were of the opinion that the Court of Exchequer had no power to make the rules; Lords Cranworth and Wensleydale of a different opinion. Lord St. Leonards (p. 743): "It is clearly laid down that no right of appeal can be given except by express words . . . no such right can arise by implication or inference." No dissent was expressed by any Lord, the whole dispute being whether the words had the meaning contended for by the Crown—Lord Wensleydale, one of the dissenting Lords, saying, p. 756: "However much you may be satisfied that the Legislature must have intended to give it (*i.e.*, the right to appeal), it is not enough unless there are words to give it."

In our own Court of Error and Appeal, *Re Freeman* (1862), 2 E. & A. 109, seems to have been decided on the same principle.

But the Crown goes further and contends that, if any right of appeal be given, that excludes any other method—the statutory method must be followed and no other. This, it will be remembered, was the view of the Divisional Court in *Re Harper*: and I am of opinion that it is clear law. The principle is an application of the maxim "*expressio unius est exclusio alterius*;" and no maxim was ever more applicable to the interpretation of a statute than this.

D. C.  
1910  
—  
REX  
v.  
GRAVES.  
—  
Riddell, J.

D. C.  
 1910  
 REX  
 v.  
 GRAVES.  
 ———  
 Riddell, J.

It has been applied in terms to the interpretation of statutes in many cases: *e.g.*, *The Queen v. Caledonian R.W. Co.* (1850), 16 Q.B. 19, at p. 31; *Cates v. Knight* (1789), 3 T.R. 442, at p. 444, *per* Kenyon, C.J.; *Newton v. Holford* (1845), 6 Q.B. 921, at p. 926, *per* Tindal, C.J., in *Cam. Scacc.*; *Edinburgh and Glasgow R.W. Co. v. Magistrates of Linlithgow* (1859), 3 Macq. Sc. App. Cas. 691, at pp. 717, 730; and *Watkins v. Great Northern R.W. Co.* (1851), 16 Q.B. 961, was decided on the same principle. See *Caledonian R.W. Co. v. Colt* (1860), 3 Macq. Sc. App. Cas. 833, at p. 839; *Lawrence v. Great Northern R.W. Co.* (1851), 16 Q.B. 643. In loosely drawn private Acts the rule may be relaxed: *Thames Conservators v. Smeed*, [1897] 2 Q.B. 334, at p. 351; *Bostock v. North Staffordshire R.W. Co.* (1855), 4 E. & B. 798, at p. 832.

But the case most in point is the case in the House of Lords above noted. In 10 H.L.C. at p. 776, Lord Kingsdown says: "The Legislature has given no general power to the Superior Courts to review the decisions of the Court of Exchequer. It has prescribed certain special modes of proceeding by which this may be done, and has by necessary implication excluded others."

It seems to me that the Legislature having by the Ontario Habeas Corpus Act, sec. 8 (1), provided for an appeal from the decision of a Judge when the person is remanded into custody, not only is there no other appeal, but the Court could not give any other appeal.

It is or may be said that the right of appeal has been recognised by us on other occasions. For example, in *Rex v. Leach*, 17 O.L.R. 643, we discussed the law upon an appeal of this character, but it will be seen by the report that we did not pass upon the right of appeal, as we were against the appellant upon the merits: pp. 646, 667. So also in *Rex v. Miller* (1909), 19 O.L.R. 125. We have not been referred to any case in which the prisoner was discharged upon an appeal to the Divisional Court from an unsuccessful application to a Judge, and I have not been able to find any except the *Teasdale* case.

In *Rex v. Akers* (1910), 1 O.W.N. 585, 15 O.W.R. 679, the Chancellor refused a motion for a *habeas corpus*; an appeal was taken to a Divisional Court: 1 O.W.N. 672. It is not quite correct to say (as the report has it) that "the right of the defendant to come



before a Divisional Court by way of appeal was not combatted," unless the reference be to want of opposition at the Bar. The Court took the objection, but said that the motion might be treated as an application to one of us in Chambers, and, as we thought the writ should issue, it was accordingly issued. We did not require to consider our power to do this in *Rex v. Miller*, 19 O.L.R. 125. The principle we proceeded upon was that laid down by Lord Halsbury in *Cox v. Hakes* (1890), 15 App. Cas. 506, at p. 514: "For a period extending as far back as our legal history, the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might . . . make a fresh application to every Judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question . . ."

This judgment cites with approval the former case of *Ex p. Partington* (1845), 2 D. & L. 650, 13 M. & W. 679, 684. A writ of *habeas corpus* had been before the Court of Queen's Bench, and upon the return the defendant had been remanded to custody. He then applied to the Lord Chief Baron, Pollock, in Chambers, for a new writ, which was refused. He then applied to the Court of Exchequer in banc for a new writ. The Court, after setting out the above facts, said (13 M. & W. at p. 684): "The defendant, however, has a right to the opinion of every Court as to the propriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute, without considering ourselves as concluded by these decisions." The Court agreed with the Court of Queen's Bench and the Lord Chief Baron, and refused the writ. The report in 2 D. & L., at p. 653, represents Parke, B., speaking for the Court, as having said upon the hearing of the motion, when *cur. adv. vult*: "On an application for a *habeas corpus*, we are bound to decide the party's right to the writ; and although the matter has already been brought before another Court, still in favour of liberty, the prisoner is entitled to have the opinion of each Court."

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

The law is thus laid down in 6 Encyc. Laws of England, p. 486: "It is, however, clear that where an application for the writ is refused, the applicant has in every case a right to go from Court to Court and make a fresh application to each Court in turn."

That such was the law in our Province is clear from such cases as *Taylor v. Scott*, 30 O.R. 475, and the cases cited therein. When the law in respect of *habeas corpus* was changed by the Act of 1867, 29 & 30 Vict. ch. 45, and an appeal given which did not formerly exist, it was considered "that there can be no longer the right to apply for a writ of *habeas corpus* to one Court after another . . . The intention of the Legislature evidently was that the remedy should be worked out by the machinery of the appeal, and that there should be no second writ allowed:" *Re Hall*, 8 A.R. 135, at p. 149, per Patterson, J.A. And in *Taylor v. Scott*, 30 O.R. 475, the question was further discussed. There, upon the return of a *habeas corpus*, Mr. Justice Ferguson had remanded the person on whose behalf the writ had been obtained (an infant) to the custody of the defendant. No appeal was had, but an action was brought by the plaintiff against the defendant for the recovery of the possession of this person, her infant child. Mr. Justice MacMahon dismissed the action, and an appeal was taken to the Queen's Bench Divisional Court. The Court said that, had it not been for the right of appeal, the judgment of Ferguson, J., would not have been conclusive against any other application that might thereafter be made by *habeas corpus* by the plaintiff to get her child out of the custody of the defendant. But, after so saying and citing R.S.O. 1887, ch. 70, and R.S.O. 1897, ch. 83, the Court says that a person is limited, by reason of such appeal having been given, to one *habeas corpus*: and, if the decision of a Judge in Chambers or the Court is not appealed against, the matter is *res adjudicata*, and no other writ can be obtained.

The whole *ratio decidendi* was that an appeal lay to the Court of Appeal, and the result was that only one writ could be obtained. But the case of refusal to grant a writ was not touched or affected by the statute or the cases, and I think that the common law right of going from Judge to Judge until either a writ is obtained or every Judge has refused, still remains.

In *Rex v. Robinson* (1907), 14 O.L.R. 519, another case in which *Taylor v. Scott* would not apply is given.

In *Rex v. Miller* (No. 2) (1909), 19 O.L.R. 288, the Exchequer Division held that the adjudication by Mr. Justice Latchford which had not been interfered with by the King's Bench Division was *res adjudicata*, following *Taylor v. Scott*. But, again, no judgment was given by that Division affecting the right to apply to another Judge for a *habeas corpus* after refusal by one Judge. There was nothing then to prevent any one of the Judges in the King's Bench Division granting a writ in the *Akers* case; and it was in pursuance of that power that the writ was issued, and not as an order made on appeal from the Chancellor.

As to the application substantively to us in the Divisional Court for a writ of *habeas corpus*, there are two objections: (1) the matter is *res adjudicata* unless and until Mr. Justice Sutherland's judgment is got rid of; and (2) the Divisional Court, as a Divisional Court, has no jurisdiction: *Rex v. Miller* (No. 2), 19 O.L.R. at p. 290. Upon the former point I have nothing to add; upon the latter, while the Habeas Corpus Act has not expressly taken away the power at common law of the Court in banc to issue the writ, the Divisional Court is not the Court in banc—the full Court. The late Chief Justice of the Queen's Bench was wont to contend that the Court of Queen's Bench had not been abolished, and that he could at any time with his brethren of the Queen's Bench Division reconstitute the Court of Queen's Bench and sit as such Court; but he never contended that the Divisional Court was the Court of Queen's Bench. And upon this motion now under consideration we sat not as Judges of the or a Court of King's Bench but as members of a Divisional Court of the High Court of Justice—and the Court was a Divisional Court of the High Court of Justice, a species of committee with certain fixed statutory powers. *Rex v. Miller* (No. 2) should be followed.

But one other point remains for consideration, that mentioned, but not decided, in *Rex v. Robinson*, 14 O.L.R. 519, at p. 520. Does the fact that, in this particular kind of case, the right of appeal is or may not be absolute, but only at the option of the Attorney-General, affect the rule in *Taylor v. Scott*?

I am unable to see how that makes the slightest difference—the appeal, if appeal there be, must be expressly given, and the fact that a right of appeal only is given optional with the Attorney-

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

D. C.  
1910  
REX  
v.  
GRAVES.  
Riddell, J.

General, and which, being illusory, consequently keeps the word of promise to the ear and breaks it to the hope, is wholly immaterial.

I am of the opinion that the appeal should be dismissed upon the ground of want of jurisdiction only; but, as the defendant, in view of the *Teasdale* case, might well think that this Court had and would exercise jurisdiction, there should be no costs.

FALCONBRIDGE, C.J.:—For the reasons given by my brother Riddell, I agree that we ought to follow *Re Harper*, 23 O.R. 63. That case was, it appears, not cited to the Court which decided *Rex v. Teasdale*, 20 O.L.R. 382.

It is unnecessary for me, therefore, to express any opinion as to the other questions so elaborately discussed by my brother Riddell, but I do not wish to be understood as dissenting from his conclusions.

It is very unfortunate that the opinions of different Divisional Courts should be thus opposed, *toto coelo*, the one to the other, and it is to be hoped that in a proper case an authoritative judgment may be obtained from the Court of Appeal.

The appeal will be dismissed without costs.

BRITTON, J.:—As I agree with the decision of my brother Riddell, that the previous conviction was not proved, and that the conviction for a second offence cannot stand, the only point I need further consider is as to the right of the Divisional Court to entertain this appeal.

The proceedings in reference to which this appeal is taken were commenced by writ of *habeas corpus*, and they, in my opinion, constitute “an action,” within the meaning of the word as defined by sec. 2 of the Judicature Act. The offence of which the prisoner was convicted and for which he was committed to prison was one within the jurisdiction of the Province of Ontario. A civil proceeding such as intended by this section may well be any proceeding commenced by writ, where it is not in reference to a criminal offence, made such by a statute of the Dominion of Canada, or where it is not a common law offence.

A proceeding commenced by writ must be, within the meaning of the Interpretation Act, either civil or criminal. This is certainly not a criminal proceeding. That it has been held, and rightly so, in certain cases and for certain purposes, that a writ of *certiorari*,



or a proceeding commenced by *certiorari*, is not a civil proceeding, does not affect the argument.

If Rule 777 applies, then an appeal is expressly given, and so the case of *The Queen v. Stock*, 8 A. & E. 405, and such cases, have no application. I quite agree that a right of appeal cannot be implied. The view I took in *Rex v. Teasdale* was that this Rule expressly gave an appeal, and that such appeal was not taken away, because of an appeal conditionally given, under other circumstances, from either a Judge or the Divisional Court.

The case *Re Harper*, 23 O.R. 63, was not cited on the argument in *Rex v. Teasdale*, 20 O.L.R. 382. In the *Harper* case the prisoner was convicted, under secs. 238 and 239 of the Code, of being a vagrant. The offence was a crime. The proceeding was a criminal proceeding. The Liquor License Act had, therefore, no application. The decision there was simply upon the Habeas Corpus Act. It was held that, there being an appeal specially given by that Act, the appeal could only be as that Act provides. The principle "*expressio unius exclusio alterius*" was applied.

Here there is no appeal unless the prisoner has the right of appeal under Con. Rule 777; sec. 121 of ch. 245, R.S.O. 1897, gives the appeal from a single Judge to the Court of Appeal only when "the Attorney-General for Ontario certifies that he is of opinion that the point in dispute is of sufficient importance to justify the case being appealed." This prisoner has not obtained such certificate; therefore, he has no appeal to the Court of Appeal under the Liquor License Act, or Habeas Corpus Act. The prisoner does not know whether the Attorney-General will or may consider the point in dispute in his case of importance or not. He is in custody. He alleges that he is wrongfully in custody. He obtained a writ of *habeas corpus*, made returnable before a Judge in Chambers, and upon its return the learned Judge did not agree with the prisoner's contention and remanded him to custody. That was an adjudication, final, unless reversed in appeal. Under the Habeas Corpus Act, were it not for the Liquor License Act, he could have appealed to the Court of Appeal, and, with that course open, the case of *Re Harper* would be conclusive against his appealing to a Divisional Court. But the door is now closed unless he can get a certificate from the Attorney-General. That being the law, and in the absence of express enactment saying that Con. Rule 777 shall not apply to

D. C.  
1910  
—  
REX  
v.  
GRAVES.  
—  
Britton, J.

D. C.  
 1910  
 REX  
 v.  
 GRAVES.  
 Britton, J.

an application for the discharge of a prisoner from custody, I feel it to be my duty to give effect to that Rule. But for sec. 121 of ch. 245, the prisoner would have an appeal, as of right, to the Court of Appeal, and in that case it might well be said that there is only one door to an appellate Court.

In my opinion, there is jurisdiction to hear the appeal, and the appeal should be allowed, on the one ground stated above.

---

[DIVISIONAL COURT.]

D. C.  
 1910  
 June 11.

RE GILES AND TOWN OF ALMONTE.

*Municipal Corporations—Local Option By-law—Voting—Form of Ballot—Liquor License Act, sec. 141, sub-sec. 8—Mistake—Interpretation Act, sec. 7 (35)—Municipal Act, sec. 204.*

By 8 Edw. VII. ch. 54, sec. 10, the Ontario Liquor License Act, sec. 141, is amended by adding thereto a sub-section providing that the form of the ballot paper to be used for voting on a by-law prohibiting the sale by retail in a municipality of intoxicating liquors shall be, "For Local Option"—"Against Local Option." After the passing of the amending Act, a by-law was submitted to the electors of a town, and the form of ballot paper used was not that prescribed by the amendment, but "For the By-law"—"Against the By-law:"—

*Held*, MIDDLETON, J., *dubitante*, that the defect in form was cured by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35); that the mistake was not such as was calculated to mislead the voters; and (*per* BRITTON, J.) that, upon the material before the Court, the voting was, apart from this mistake, conducted according to the principles of the Act, and the result was not affected by the mistake; and, therefore, sec. 204 of the Municipal Act could be applied.

Order of MEREDITH, C.J.C.P., 1 O.W.N. 698, affirmed.

APPEAL by William Giles from the order of MEREDITH, C.J.C.P., 1 O.W.N. 698, dismissing without costs a motion to quash a by-law of the town prohibiting the sale by retail in the town of intoxicating liquors, on the ground that the form of ballot used in voting was not that prescribed by the Act 8 Edw. VII. ch. 54, sec. 10 (O.), amending the Liquor License Act, sec. 141, by adding thereto the following sub-section:—

"(8) The form of the ballot paper to be used for voting on a by-law under this section or any sub-section thereof shall be as follows:—

"For Local Option.

"Against Local Option."

June 7. The appeal was heard by a Divisional Court composed of BRITTON, CLUTE, and MIDDLETON, JJ.

*J. Haverson*, K.C., for the appellant. The language of the amending section is imperative, and requires that in the case of local option by-laws the issue should be so plainly laid before the electors in the form used that there can be no mistake or confusion such as might arise in the present case where another by-law was being voted on at the same election. A serious irregularity has been shewn in the manner of conducting the election, and the case of *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317, shews that, where such irregularity has taken place, the onus is laid on the respondents of shewing that it did not affect the result of the election. The respondents have failed to shew this in the present instance.

*W. E. Raney*, K.C., for the respondents. As regards the alleged confusion between this by-law and the other one voted upon at the same election, the facts are identical with those in the case of *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488—see especially the judgment of Mulock, C.J., at p. 504. As to the alleged imperative force of the word “shall” in the section prescribing the form of ballot paper, I refer to sec. 351 of the Consolidated Municipal Act, 1903, which brings in secs. 138-206 as applying to matters of procedure. The word “shall” frequently appears in these sections (see especially sec. 165), and there is no greater necessity for giving it the imperative force contended for in the present instance than there is in connection with any other section of the Municipal Act dealing with matters of procedure. The following cases were referred to: *In re Huson and Township of South Norwich* (1892), 19 A.R. 343, per Hagarty, C.J.O., at p. 350; *Re Young and Township of Binbrook* (1899), 31 O.R. 108, per Street, J., at p. 111; *Northcote v. Pulsford* (1875), 44 L.J.N.S. C.P. 217; *The Queen v. Lofthouse and Wilson* (1866), L.R. 1 Q.B. 433; *Regina ex rel. Regis v. Cusac* (1876), 6 P.R. 303; *Ackers v. Howard* (1886), 16 Q.B.D. 739, at p. 746.

*Haverson*, in reply, cited the following cases in answer to the English cases referred to by counsel for the respondents: *Gothard v. Clarke* (1880), 5 C.P.D. 253; *Harmon v. Park* (1881), 7 Q.B.D. 369; *Burgoyne v. Collins* (1882), 8 Q.B.D. 450; *Moorhouse v. Linney* (1885), 15 Q.B.D. 273.

D. C.

1910

RE GILES  
AND  
TOWN OF  
ALMONTE.

D. C.

1910

RE GILES  
AND  
TOWN OF  
ALMONTE.

Britton, J.

June 11. BRITTON, J.:—Appeal from the judgment of the Chief Justice of the Common Pleas refusing to quash local option by-law No. 514, passed by the municipal council of the town of Almonte, on the ground that the ballot papers used for voting on the said by-law were not in accordance with the form prescribed by sub-sec. 8 of sec. 141 of the Liquor License Act, which requires the words "For Local Option," and "Against Local Option"—the words on ballots used being "For the By-law," and "Against the By-law;" and on the ground that the directions posted up followed the form of ballot used.

It was the clear intention of the Legislature that the form prescribed should be used. The words of the Act 8 Edw. VII. ch. 54, sec. 10, are peremptory—"The form of the ballot paper . . . shall be as follows . . . ."

It may fairly be said, upon the material before the Court, that the voting on this by-law was, apart from using this form of ballot, conducted according to the principles laid down in the Municipal Act, under which Act the voting on local option by-laws takes place.

If sec. 204 of the Municipal Act applies, the by-law ought not to be quashed.

Apart from sec. 204, this, in my opinion, is a case where the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-sec. 35, should be applied. "Deviations therefrom not affecting the substance" must be determined by the particular facts in each case.

In this case "For Local Option" means "For the By-law." It would be quite different in the case of a repealing by-law. There "For the By-law" would mean "Against Local Option."

Then this mistake was not in this case calculated to mislead. It was not even plausibly suggested how any voter could in voting upon this by-law be misled by the mistake in the words upon the ballot.

The fact that the clerk of the municipality on the day of nomination announced that the ballots for voting upon the local option by-law and another by-law would be on different coloured paper is of no importance whatever.

No one has said that he or any one else was misled. The vote was large—325 in favour and 186 against, giving 139 majority. The result is a marked expression of the wish of the people, and the will of the voters should not be thwarted unless there is not only irregularity but irregularity that resulted in some voter being misled.



Only 110 voters in all voted against the Wylie exemption by-law. If all these voted by mistake, and intended to vote against the local option by-law, there still would be a majority of 29 in favour of local option: not the three-fifths majority required, but still a majority of the votes polled; and a large vote was polled. It is impossible to think that there was a mistake of even one voter. No unfair conduct or corrupt practice is said to have taken place.

In *Re Hickey and Town of Orillia*, 17 O.L.R. 317, the irregularities were gross, and they were considered such as interfered with the polling of "a full, fair, and untrammelled vote;" such irregularities as were not cured by sec. 204 of the Municipal Act.

There is here nothing to suggest any intentional violation of the Act, nor any reason for believing that any disregard of any statutable formalities called for by the Act affected the result of the voting. See *Re Sinclair and Town of Owen Sound*, 12 O.L.R. 488.

The appeal should be dismissed; costs of appeal to be paid by the appellant.

CLUTE, J.:—The sole question argued was as to the sufficiency of the form of the ballot used at the election. The form used was that existing prior to the amending Act of 1908, where the words in the respective columns are "For the By-law," "Against the By-law." The statute 8 Edw. VII. ch. 54, sec. 10, amends the Liquor License Act, sec. 141, and provides that the form of the ballot paper to be used for voting on a by-law under that section shall be as follows: "For Local Option," and in the other "Against Local Option," and at the head giving a reference to the ballot.

I agree with the learned Chief Justice that the defect in form, if any, is cured by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-sec. 35, which reads: "Where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them."

Although the words used were "For the By-law," instead of "For Local Option," they were, in my view, the same in substance. Nor do I think the change was calculated to mislead any voter:

I would dismiss the appeal with costs.

MIDDLETON, J.:—I am not sorry that my brothers see their way to uphold the by-law in question and so give effect to the will of the electorate.

D. C.  
1910  
RE GILES  
AND  
TOWN OF  
ALMONTE.  
Britton, J.

D. C.

1910

RE GILES  
AND  
TOWN OF  
ALMONTE.

Middleton, J.

Speaking for myself, I am by no means clear that the Court has the right to declare immaterial that which the Legislature has thought of sufficient importance to warrant an amendment of the statute. Nor am I clear that this is a matter covered by sec. 204 of the Municipal Act.

No good purpose would be served by a dissent from the opinions of the majority, so I somewhat reluctantly concur.

---

[DIVISIONAL COURT.]

D. C.

1910

June 13.

RE TOWNSHIP OF PEMBROKE AND COUNTY OF RENFREW.

*Municipal Corporations—Maintenance of Bridge—Duty of County Council—Bridge Crossing Stream Forming Boundary between Local Municipalities—Assumption by County—Enforcement of Obligation to Repair—Decision of County Council—Review by County Court Judge—Municipal Act, 1903, secs. 613-618, 622(a).*

A bridge spanning the Muskrat river, which forms the boundary line between the township of Pembroke and the town of Pembroke, was built by private persons; in 1875 it was repaired by a committee appointed by the county council, and the repairs were in 1876 paid for by the county, since which time the county council had done nothing to keep it in repair; it had been kept in repair, however, by private subscriptions, and had been constantly used by the public, the road of which it formed part being a public highway, accepted and used as such for more than forty years:—*Held*, that it had been assumed in 1875 as a county bridge; and the county corporation were not, by their subsequent neglect of duty, relieved from their obligation to maintain and repair it.

*Held*, also, that, having regard to the provision in clause (a) of sec. 622 of the Municipal Act, 1903, and upon a consideration of the provisions of secs. 613 to 618, the duty was imposed upon the county of maintaining the bridge, whether it was ever formally assumed by the county or not.

*O'Connor v. Townships of Otonabee and Douro* (1874), 35 U.C.R. 73, distinguished.

*Held*, also, that the obligation can be enforced under sec. 618.

*Quare*, per MIDDLETON, J., whether the decision of the county council can be reviewed by the County Court Judge.

Judgment of the Judge of the County Court of Renfrew affirmed.

APPEAL by the Corporation of the County of Renfrew from an order of the Judge of the County Court of the County of Renfrew, dated the 4th April, 1910, made on the application of the Corporation of the Township of Pembroke, under sec. 618 of the Municipal Act, 1903, as amended and re-enacted by 7 Edw. VII. ch. 40, sec. 24, and 9 Edw. VII. ch. 73, sec. 29, whereby he ordered and declared that the duty and liability of maintaining a certain bridge known as "Foster's bridge," over the Muskrat river, belonged to and rested on the Corporation of the County of Renfrew.

The material facts as found by the County Court Judge were as follows:—

(1) That the bridge spans the Muskrat river, which river at this point forms, since the 28th September, 1864, the boundary line between Pembroke township and the town of Pembroke, in the county of Renfrew.

(2) That the public highway connected and made continuous by the bridge is one of the main public highways in the township of Pembroke, and has been so used for over forty years.

(3) That the bridge is out of repair to such a degree as to make it unsafe for public travel over it.

The evidence shewed that the first bridge over the river at this point was built by Greaves and Rodden, some time in the early sixties, to enable people to get to their grist mill, which stood on the east bank of the river close to the end of the bridge; that when the bridge was first erected the river then formed the boundary line between the town and the township of Pembroke, and that at the time the Forest road—1788 feet in length, leading to the west from the bridge—was opened up from the town-line between Stratford and Pembroke townships to the bridge, such bridge connected and made a continuous highway from Mackey street, east of the bridge, in the town of Pembroke, to the town-line west of it, in the township of Pembroke.

The bridge built by Greaves and Rodden was swept away, and afterwards one Foster, who succeeded Greaves and Rodden in their milling business, built a bridge on the same site by private subscription. This bridge was known as "Foster's bridge," and, while there was no evidence as to when it was built, there was evidence that it was repaired by a committee appointed by the county council in 1875, and that in 1876 the county council paid for such repairs, since which time the county council had done nothing to keep the bridge in repair; but it had since then and till the last few years been kept in a more or less efficient state of repair by private subscriptions, or in some such manner, so that the public had been constantly using it.

The learned County Court Judge further found upon the evidence that the bridge connects and makes continuous one of the main public highways of the township of Pembroke, and that the highway so connected by it, besides being one of the public highways of the

D. C.  
1910  
RE  
TOWNSHIP  
OF  
PEMBROKE  
AND  
COUNTY  
OF  
RENFREW.

D. C.  
1910  
RE  
TOWNSHIP  
OF  
PEMBROKE  
AND  
COUNTY  
OF  
RENFREW.

town of Pembroke, is also part of a much travelled main highway through the county of Renfrew from Pembroke to Eganville, known as the "Eganville road," and upon the last mentioned road large sums of money have been spent by the government from time to time since about the year 1868.

Upon this state of facts the learned County Court Judge was asked to say whether the County Corporation were or were not liable to maintain the bridge, and he decided that they were.

May 12 and 13. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and MIDDLETON, JJ.

*H. E. Rose*, K.C., for the appellants. It was held by the County Court Judge that the case comes within sub-sec. 4 of sec. 613 of the Consolidated Municipal Act, 1903, which provides that every county council shall have exclusive jurisdiction over all bridges over rivers forming boundary lines between two local municipalities in the county. It is submitted, however, that, as held in *O'Connor v. Townships of Otonabee and Douro* (1874), 35 U.C.R. 73, with regard to the similar sec. 410 of the Municipal Act of 1873, sub-sec. 4 is applicable only to a bridge which has been assumed by the county council. The County Court Judge endeavours to distinguish the *O'Connor* case from the present one, on the ground that its *ratio decidendi* is gone by reason of clause (a) added to sec. 622 of the Municipal Act, but this view cannot be successfully maintained; the authority of the *O'Connor* case is unshaken, and is decisive of the question at issue. As regards the Judge's finding that the bridge has been assumed by the county council, the evidence to support this is altogether insufficient. The expenditure of a small sum of money in a single act of repair in 1876 cannot fasten an obligation on the county to maintain the bridge for all time to come. Section 613 simply deals with jurisdiction, and does not impose an obligation to repair, and, if the county council should determine in good faith that no bridge was necessary at a particular point, their decision could not be interfered with by the County Court Judge.

*Peter White*, K.C., for the respondents. The judgment in the Court below was well founded in law and fact, and the *O'Connor* case, relied on by the appellants, has no bearing on the question between the parties, since the amendment introduced by clause (a) of sec. 622. The effect of the legislation and of the cases bearing on the subject is to shew that the County Court Judge has a right to



review the decision of the county council: see *Re Moulton and Haldimand* (1885), 12 A.R. 503, *per* Burton, J.A., at p. 507, where he distinguishes that case from *Brooks v. Corporation of Haldimand* (1878), 3 A.R. 73. As to the question of fact, the county council by their action had assumed the bridge in the most unequivocal and conclusive way, and the decision of the County Court Judge on that point is not open to question here. The action of the council in appointing a committee to repair the bridge was equivalent to passing a by-law for its assumption. The following authorities were also referred to: *Re Moulton and Haldimand*, *supra*, *per* Patterson, J.A., at pp. 523, 524, 526, 527, 531, also the remarks quoted from Robinson, C.J., at p. 533, and *per* Osler, J.A., at p. 540; *Re Township of McNab and County of Renfrew* (1905), 6 O.W.R. 523, at p. 526; *Holland v. Township of York* (1904), 7 O.L.R. 533; *Regina v. Corporation of Yorkville* (1872), 22 C.P. 431.

*Rose*, in reply, said that the *Yorkville* case was entirely different from the present one. In that case no threat had been made against the corporation, and there was evidence of assumption of the road by public user. He referred to *McHardy v. Townships of Ellice and Downie* (1877), 1 A.R. 628, *per* Burton, J.A., at p. 637; *Brooks v. Corporation of Haldimand*, *supra*, *per* Moss, C.J.A., at p. 75; *Township of North Dorchester v. County of Middlesex* (1889), 16 O.R. 658, at p. 660.

June 13. CLUTE, J. (after setting out the facts as above):—Reference is made to secs. 598, 606, 607, 613, 617, and 622 of the Municipal Act, 1903.

Section 613 provides that every county council shall have exclusive jurisdiction (1) over all roads and bridges lying within any township, town or village in the county which the council by by-law assumes, with the assent of such township, town or village municipality as a county road, or bridge until the by-law assuming the same has been repealed by the council; and (omitting sub-secs. 2 and 3, which do not apply), by sub-sec. 4, over all bridges over rivers, streams, ponds or lakes forming or crossing boundary lines between two local municipalities in the county.

It is contended that this bridge comes within sub-sec. 4 of this section, and the learned County Court Judge has so found, and it is against this finding that this appeal is taken.

D. C.  
1910  
RE  
TOWNSHIP  
OF  
PEMBROKE  
AND  
COUNTY  
OF  
RENFREW.

D. C.  
1910  
RE  
TOWNSHIP  
OF  
PEMBROKE  
AND  
COUNTY  
OF  
RENFREW.  
Clute, J.

Mr. Rose urged very strongly that the law as laid down in *O'Connor v. Townships of Otonabee and Douro*, 35 U.C.R. 73, was applicable to this case. It was there held that sec. 410 of the Municipal Act, 1873, must be read as modified by secs. 416 and 431, as meaning that every road dividing different townships shall, *when assumed by the county council*, be within the exclusive jurisdiction of the county. In other words, that there must be read into sec. 410 the words, "when assumed by the county council." Section 410 corresponds to sec. 613, and 416 to 622 of the present Act.

The judgment in the *O'Connor* case was an endeavour to reconcile secs. 410 and 416 of 36 Vict. ch. 48; sec. 410 provided for a joint jurisdiction in certain cases, and here arose apparently a conflicting jurisdiction, which was reconciled by the Court holding that sec. 410 must apply only to those cases where the county have assumed jurisdiction over the bridge.

An amendment to sec. 416, as it now appears in clause (a) of sec. 622, reads: "The word 'road' in this section shall not include a bridge over a river, stream, lake or pond, forming or crossing the boundary line between two municipalities other than counties, which bridge it is the duty of the county council to erect and maintain."

In my opinion, this entirely eliminates the ground for the decision in the *O'Connor* case. With this amendment there is no further need for reconciling the two sections, and the result is that sec. 613 must have its plain meaning, which is that the county council has exclusive jurisdiction "over all bridges over rivers, streams, ponds or lakes forming or crossing boundary lines between two local municipalities in the county:" sub-sec. 4.

Section 617, sub-sec. 1, makes it the duty of the county councils to erect and maintain bridges over rivers, streams, ponds, or lakes forming or crossing boundary lines between any two municipalities (other than a city or separated town) within the county. This portion of sub-sec. 1 refers to the same class of bridges as is referred to in sec. 613, sub-sec. 4.

The subsequent part of sub-sec. 1 of sec. 617 provides for the case of a bridge between two or more counties, or a county, city, or separated town, in which case the bridge shall be erected and maintained by the counties or county, city, and separated town respectively, as the case may be. If Pembroke was a separated

town, and the question was between Pembroke and the county, as to who should maintain this bridge, there could not, I think, be any doubt under that portion of the section that it would be the duty of both to so maintain it.

In the present case, the town not being a separated town, but contributing its proportion of taxes to the county, and the jurisdiction having been taken away from the township and given exclusively to the county, it falls within their duty, under what seems to me the clear wording of the statute, to maintain this bridge upon this public highway. The bridge being there in fact and upon a public highway, the effect of sec. 613 is to give to the county council exclusive jurisdiction over the bridge, and the effect of sec. 617 is to impose upon the same county council the duty to erect and to maintain such a bridge. Under sec. 618, as amended, the duty to settle a dispute of this kind is now imposed upon the Judge of the County Court.

In the present case the corporations of both the adjoining township of Pembroke and the town of Pembroke supported the application before the County Court Judge. The formal proceedings were taken by the township council and acquiesced in by the town.

It did not appear clear upon the argument what formality was adopted by the town in raising the question, but, as it was not disputed at Bar that the question had been properly raised, and, as no point of that kind was taken in the Court below, and full opportunity was given upon both sides to offer evidence to try the real question between the parties, it must be assumed that all formalities necessary to raise the question were either complied with or waived.

In my opinion, the effect of the statute, as amended, is not only to give jurisdiction to the county, but to impose upon the county the duty of maintaining a bridge such as the one in question; and this duty is obligatory, under the circumstances of the present case, whether the bridge was ever formally assumed by the county or not, upon the ground that it is a bridge upon and forming a part of a public highway falling within the clear meaning of the statute, which imposes a duty upon the county council to maintain it.

I also think there is evidence sufficient to support the finding of the learned County Court Judge that the county council, by their solemn act and by-law authorising the expenditure of money, and

D. C.  
1910  
RE  
TOWNSHIP  
OF  
PEMBROKE  
AND  
COUNTY  
OF  
RENFREW.  
Clute, J.

D. C.  
1910  
RE  
TOWNSHIP  
OF  
PEMBROKE  
AND  
COUNTY  
OF  
RENFREW.  
Clute, J.

the payment thereof, upon this bridge, thereby assumed the same as a county bridge; and, although they have not subsequently contributed to its maintenance, their neglect of duty in that regard does not relieve them from the obligation imposed on their earlier assumption of the bridge.

The appeal should be dismissed with costs.

MULOCK, C.J.:—I agree.

MIDDLETON, J.:—Looking at the statute as it stands to-day, we find a group of sections, 613 to 618, dealing with county roads and bridges. These sections supplement the general provisions found in secs. 606 and 607, imposing in general terms upon the municipal corporation responsible the duty of keeping highways and bridges within its jurisdiction in repair.

Section 613 confers upon county councils jurisdiction over:—

(1) Roads and bridges assumed by the county with the assent of the minor municipalities.

(2) Bridges over streams separating townships.

(3) Bridges over streams more than 100 feet wide connecting any main highway through the county situate in any incorporated village.

(4) Bridges over rivers, etc., forming or crossing boundary lines between two local municipalities.

An obligation to build and maintain the necessary road or bridge in cases falling within the first or a bridge in cases falling within the third of these four classes is imposed by sec. 616.

The obligation of the county with regard to bridges falling within the second and fourth classes is to be found in sec. 617.

Section 618 provides a code of procedure for the determination of disputes between municipalities as to the liability or duty to build and maintain bridges.

Sections 613 to 618 do not speak of “repair” but of “maintenance.” The word “maintain,” as applied to highways and bridges, is practically synonymous with “to keep in repair,” and certainly includes the obligation imposed by sec. 606.

Section 617, it seems to me, only imposes the duty to maintain as incidental to and consequent upon the duty to erect, and can only have application to the case of a bridge which has been erected in compliance with the duty imposed under that section.



When a bridge has been erected by a private person, the county will not become liable to maintain or repair it unless and until it is "established by by-law of the corporation or otherwise assumed for public use by such corporation," under sec. 607. When so "assumed" the liability to repair arises under sec. 606, and this liability will then give rise to an action, or may be enforced by mandamus, or the neglect may be punished by indictment.

Counsel for the county contend that there is here no "assumption" by the county. The learned Judge has found that there was assumption, and I am unable to say that he was wrong. I accept the statement of Armour, C.J., in *Hubert v. Township of Yarmouth* (1889), 18 O.R. 458, 467, adopted by Meredith, C.J., in *Holland v. Township of York*, 7 O.L.R. 533, that the acts relied on "must be clear and unequivocal, and such as clearly and unequivocally indicate the intention of the corporation to assume the road." Here the owner of the land erected the bridge and opened up the road, possibly, in the first instance, solely for his private purposes. He, however, soon thereafter applied for public money to be spent upon the road. A government grant and township money were spent on the road, and, so far as the road is concerned, there is ample evidence of dedication and acceptance by the municipality. The owner then, through his counsel, took the position that the county were bound to maintain the bridge, and threatened proceedings against the county to enforce the claim. The county yielded, and appointed a committee to make the repairs demanded. The repairs were made in due course and paid for by the county. This deliberate action on the part of the county, it seems to me, affords far stronger evidence than that deemed sufficient in many of the cases. The subsequent inaction of the county, the subsequent repairs, made, it is said, by public subscription, cannot, it seems to me, affect what was done in 1875 by the county council.

Then it is said that this obligation to repair cannot be enforced under sec. 618. I think the section is wide enough to apply, and was intended to give to an aggrieved municipality a summary and effectual remedy when any other municipality charged with the duty of erecting or maintaining (*i.e.*, repairing) a bridge, fails to discharge that duty. Some of the expressions in the statute are not entirely clear, but the intention is, I think, expressed.

As at present advised, I do not agree with much that is said by

D. C.  
1910  
RE  
TOWNSHIP  
OF  
PEMBROKE  
AND  
COUNTY  
OF  
RENFREW.  
Middleton, J.

D. C.  
1910  
RE  
TOWNSHIP  
OF  
PEMBROKE  
AND  
COUNTY  
OF  
RENFREW.  
Middleton, J.

the learned County Court Judge, and, while affirming his order, I desire to be free to consider the very important question whether the decision of the county council can be reviewed by the Judge when it arises. It must not be assumed too readily that *Brooks v. Corporation of Haldimand*, 3 A.R. 73, is no longer law, or that that case was successfully distinguished in the judgments of Burton and Patterson, J.J.A., in *Re Moulton and Haldimand*, 12 A.R. 503.

It may not be amiss to point out that the difficulty with which the Court had to deal in *O'Connor v. Townships of Otonabee and Douro*, 35 U.C.R. 73, upon the Municipal Act as it then stood, does not now exist. The section then corresponding with 613 (4) provided that boundary roads and bridges should be under the jurisdiction of the county, and the section corresponding with 622 provided that boundary roads should be under the jurisdiction of the township. To reconcile this conflict, the Court read into the earlier section the words "when assumed by the county," and confined the latter section to roads not so assumed.

In the present statute there is no conflict. Section 613 (4) only gives the county jurisdiction with respect to bridges (the word "roads" being omitted), and sec. 622 (a) excepts from the joint jurisdiction the bridge over which the county has jurisdiction, the latter clause of the section being added to leave within the jurisdiction of the townships bridges over streams less than eighty feet wide. When under sec. 617 (3) such bridges are excepted from the control of the county.

Appeal dismissed with costs.

---

## [DIVISIONAL COURT.]

LINDSAY V. IMPERIAL STEEL AND WIRE CO.

D. C.

1910

Jan. 7.  
June 13.

*Company—Issue of New Shares—Contract—Construction—Purchase of Inventions—Transfer of Common Shares—Bonus to Purchasers of Preferred Shares—Colourable Transaction—Ultra Vires—Declaration as to Part of Contract—Status of Shareholders to Maintain Action—Parties—Company Made Defendant—Judgment Varied in Favour of Non-appelling Defendant.*

The defendant company was incorporated in 1901, under the Ontario Companies Act, with a capital stock of \$700,000. On the 22nd July, 1907, the directors adopted a by-law to increase the stock to \$1,500,000, by the issue of 50,000 shares of new common stock of the par value of \$10 each, "which may be issued as a bonus, share for share," and by the issue of 30,000 shares of new preferred stock of the par value of \$10 each, "which will be sold for cash," and "that the new shares, both common and preferred, be issued and allotted in such manner and proportions as the directors of the company may deem proper for the benefit of the company." This by-law was approved by the shareholders at a general meeting. Supplementary letters patent were granted authorising the increase of the stock to \$1,500,000 by the issue of \$800,000 shares of \$10 each, all of common stock. The directors each year appointed an executive committee, as authorised by the by-laws of the company, to do all things that the directors of the company could do, with the limitation that the committee should report to the board of directors. After the increase in the capital stock, the committee on the 18th June, 1908, resolved that 50,000 shares of the common stock be allotted to McB. in accordance with his application of the 16th June, 1908. By an agreement, bearing that date, between McB. and the company, it was recited that McB. was in possession of certain new and valuable discoveries (described), and had agreed to transfer his interest therein to the company, in consideration of the transfer to him of 50,000 shares of common stock, on the terms and conditions set forth, among which were: that he was immediately to apply for 50,000 shares of common stock; he was to be called upon to pay over at once only \$10, being the par value of one share; to transfer to the company all his rights for Canada and one-half interest in his rights for other countries; he was to transfer 40,000 shares to a person to be mutually agreed upon between himself and the president of the company, so that the 40,000 shares, or part thereof, in the sole discretion of such person, might be given as a bonus to purchasers of preferred stock, to promote the sale of the remainder of the company's stock; the remaining 10,000 shares to be transferred to the person agreed upon, not to be delivered until a Canadian patent should issue; this person to have the sole right to vote on the stock; and on the fulfilment of the agreement by McB. he to be released from liability on his application for shares:—

*Held*, that it must be taken that the application of McB. for the shares was in pursuance of this agreement, and that McB. was not to pay for the shares in cash or otherwise except as mentioned in the agreement.

The executive committee passed a resolution that the company purchase from McB. the patents described in the agreement, on the terms set forth therein, and that the performance on his part thereof be accepted in satisfaction of the balance due for shares allotted to him; and on the 30th June, 1908, he signed a receipt for a certificate for 50,000 shares. This action was bought by certain shareholders of the company, who, by amendment made at the trial, sued on behalf of themselves and all other shareholders, for a declaration that the transfer of the shares to McB. was null and void, and that the shares should be retransferred to the

D. C.  
1910  
—  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.

company; a declaration that the issue of the \$800,000 additional stock was fraudulent and illegal and for cancellation thereof; and for other relief. The defendants were the company, McB., and C., the managing director and president. The defendants disputed the right of the plaintiffs to maintain the action:—

*Held*, that, if the acts complained of were *intra vires* the corporation, the action could not succeed; but the agreement provided an indirect method of selling the company's preferred stock with a bonus from the company of common stock; it was a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; and was *ultra vires* of the company; and therefore the plaintiffs were entitled to maintain the action.

The whole contract was not void, however; the real price for the inventions was the block of 10,000 shares of the 50,000, and to that block McB. was entitled; the contract was double, and the two portions were separable; the part relating to the 40,000 shares should be declared void; and the other should stand, there being no evidence of value or other evidence of fraud on which it could be impeached, even if the action were properly constituted.

*Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, and *Mosely v. Koffyfontein Mines Limited*, [1904] 2 Ch. 108, followed.

*Re Lake Ontario Navigation Co.* (1909), 20 O.L.R. 191, distinguished.

Where the effect of a judgment upon the appeal of one defendant is to establish the validity of a transaction between two defendants, the transaction may be declared valid in respect of the other, who has not appealed.

Judgment of CLUTE, J., varied in favour of the defendant B., who did not appeal, as well as of the other defendants.

ACTION to have it declared that the allotment and issue of 50,000 shares, of the value of \$10 each, of the capital stock of the defendant company, to the defendant McBean, were *ultra vires* and void.

December 22 and 23, 1909. The action was tried before CLUTE, J., without a jury, at Toronto.

C. A. Masten, K.C., and M. C. Cameron, for the plaintiffs.

I. F. Hellmuth, K.C., and F. E. Hodgins, K.C., for the defendants.

January 7, 1910. CLUTE, J.:—The company was incorporated in 1901 with a capital stock of \$700,000: 70,000 shares of \$10 each, 50,000 of which were common stock, and 20,000 shares preferred stock.

In July, 1907, the company entered into a contract with the City of Fort William to establish there a plant with an output of 100 tons daily, by the 1st June, 1908. In pursuance of that agreement and for the purpose of financing the undertaking, the company, on the 22nd July, 1907, passed a by-law to increase the capital stock from \$700,000 to \$1,500,000, by the issue of \$500,000 or 50,000 shares of new common stock of the par value of \$10 each,



"which" (the by-law states) "may be issued as a bonus, share for share, and by the issue of \$300,000 or 30,000 shares of new preferred stock of the par value of \$10 each, which will be sold for cash." The by-law further proceeds: "That the new shares, both common and preferred, be issued and allotted in such manner and proportion as the directors of the company may deem proper for the benefit of the company." The directors are thereby authorised to re-incorporate the company under the provisions of the Ontario Companies Act, or to incorporate a company by the same name to acquire all the assets and assume all the liabilities of the present company.

The company did not establish the plant at Fort William under the said agreement, although the time was extended to the month of November, 1908.

The company obtained supplementary letters patent increasing the capital of the company to \$1,500,000, and authorised the issue of 800,000 shares of \$10 each, all of common stock.

As soon as the letters patent were obtained, and on the 16th June, 1908, the defendant George McBean applied for 50,000 shares of the common stock of the company, and requested to be allotted that number of shares, which he agreed to accept and pay for in sixty days after notification of allotment, and on the 30th June, 1908, he signed the following receipt: "Receipt certificate No. 714 for fifty thousand shares common of the Imperial Steel and Wire Company Limited. George McBean."

It is this transaction which is sought to be set aside in the present action.

Ten dollars was paid by McBean on the stock before or at the time of its issue.

This outward form was a mere cover for the real transaction. McBean is a man of no means, and did not pay, and was not expected to pay, for the stock. He lent his name to enable the parties interested to obtain the stock of the company that it might be given as a bonus to any one purchasing preferred stock, the issue of which the supplementary letters patent did not authorise. The transaction was worked out in this way.

The former solicitor of the company seems to have had some bills of costs, said to amount to \$1,000, against the defendant Currie, the president and manager of the company. Currie trans-

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.  
Clute, J.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.  
Clute, J.

ferred to him two alleged inventions, for which caveats had been entered, but for which patents had not been obtained. It is said that these transfers were in payment of this bill of costs; but of this the evidence was slight, and I am strongly of opinion that it was merely a part of the scheme.

The solicitor procured McBean to act as his agent, and placed in his hands the so-called inventions; and prepared an agreement, dated the 16th June, 1908, between McBean and the company. The agreement recites that McBean is "in possession of certain new and valuable discoveries in connection with the process of wire-drawing, which inventions are more particularly described in schedule hereunto annexed." It does not appear that any schedule was annexed, and none was proven. It further recites that McBean has agreed to transfer his interest in said inventions and discoveries to the said company, in consideration of the transfer to him of 50,000 shares of common stock of the company, on the terms and conditions thereafter set forth. The agreement then provides that McBean is immediately to apply for 50,000 shares of common stock, he to be called upon to pay over at once only \$10, being the par value of one share. McBean is to transfer to the company all his rights for Canada, and an undivided one-half interest in his rights for other countries, in the said inventions. McBean agrees to transfer 40,000 shares of the said common stock to a person to be mutually agreed upon between himself and the president of the company, "so that the 40,000 shares, or such part thereof as shall in the sole discretion of said person be deemed necessary, may be given as a bonus to purchasers of preferred stock in such amounts as the said person may deem necessary or advisable to give to promote the sale of the remainder of the company's stock. The remaining 10,000 shares shall be transferred by the party of the first part to the said person, and are to be held by him and not to be delivered over to the said McBean until a Canadian patent for said invention is obtained. The person holding the stock is to have the sole right to vote on all of said shares held by him at all meetings in his own discretion without any restriction from the parties to the agreement" (that is, McBean and the company) "so long as he holds said stock. It is understood and agreed by the parties hereto that, on the fulfilment of this agreement by McBean, he is to be released from his liability on his application for shares of common

stock of the company." This document is signed by McBean and the company, and is under the corporate seal. The company's signature is confirmed by the signatures of the defendant Currie and the secretary of the company.

It will be observed that this document bears the same date as the defendant McBean's application for the stock for which it provides. Neither McBean nor Currie gave evidence at the trial, but both had been examined for discovery, and the plaintiff read a portion of their evidence, to be used as against themselves. Independently of their evidence, I think it clear, and I find as a fact, that the application for the 50,000 shares was made in pursuance of the said agreement.

I further find that the whole transaction was entered into at the instance of the defendant Currie, who was at the time president and managing director of the company, and that it was done with the object of using the stock as a bonus or for other illegal purposes.

The plaintiffs contend that this transaction is *ultra vires* and void, for the following, amongst other, reasons: because the whole transaction is one and indivisible and was entered into for an avowedly illegal and fraudulent purpose, and is in its nature outside the scope and limits of the powers of the company; that there was no valid allotment and nothing passed by the pretended issue of the stock in question; that, if the stock did pass, what took place was in effect buying back or trafficking in the company's stock; that it was an attempt to issue stock at less than its par value.

The defence called no witnesses and denied the right of the plaintiffs to maintain the action as at present constituted, the company not being party plaintiffs, and it not sufficiently appearing that the plaintiffs were in the minority.

In support of his contention Mr. Hellmuth relied on *Hamilton v. Desjardins Canal Co.* (1849), 1 Gr. 1, and *Russell v. Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474.

In the *Hamilton* case it was held that where the directors of an incorporated company misappropriate the funds of the corporation, a bill against them and the company in respect of such misappropriation cannot be sustained by some of the stockholders on behalf of all. It is there said that the company must be made plaintiff, whether the acts of the directors are void or only voidable, and the shareholders have a right, under certain circumstances, to make

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.  
Clute, J.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.  
Clute, J.

use of the name of the company as plaintiff in such proceedings, and that in "those cases where owing to circumstances the company's name cannot be used, yet, plaintiffs assuming to sue in the form used in the bill, must, in order to entitle themselves to adopt such a course, shew that the majority of corporators concur, except, indeed, where the act complained of is plainly illegal and so incapable of confirmation." The present case, in my opinion, falls within the exception here noted.

In *Russell v. Wakefield Waterworks Co.*, where a shareholder filed a bill on behalf of himself and all other shareholders, it was held on demurrer that it was not sufficiently alleged in the bill that the payment was *ultra vires*. Held, also, that, there being no allegation that the company would not sue, it was not a case in which the suit could be maintained in its present form, but leave was given to amend.

The rules as to the right of a minority to sue are given in Buckley's Companies Acts, 9th ed., p. 613: "3. A single shareholder suing on behalf of himself and others, or suing alone and not on behalf, may make the company a defendant, and may restrain the company and directors from doing an act which is illegal, or criminal, or *ultra vires* the corporation, and which a majority are consequently unable to affirm."

Numerous cases are cited which appear to bear out the correctness of this proposition, among which see *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.* (1875), 1 Ch.D. 682; *Hope v. International Financial Society* (1876), 4 Ch.D. 327.

In the present case it is expressly charged that the acts complained of are *ultra vires* of the corporation.

An amendment was allowed permitting the plaintiffs to sue on behalf of themselves and all other shareholders of the company. I cannot give effect to the objection that the action is not properly constituted.

That the agreement in question is *ultra vires* of the corporation admits of no doubt: *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125; *Welton v. Saffery*, [1897] A.C. 299; *In re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9; *In re New Chile Gold Mining Co.* (1888), 38 Ch.D. 475; *In re Almada and Tirito Co.* (1888), 38 Ch. D. 415; *In re London Celluloid Co.* (1888), 39 Ch.D. 190; *In re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66.



It was said in the present case that the shares were of little or no value in the market. Quoting again from Buckley, p. 214: "If at a time when its shares are at a discount in the market, a company under an article authorising the issue of shares at a discount issued further shares at a discount, it is clear, on the cases stated above, that such shares cannot, while the creditors are unsatisfied, be treated as fully paid. It was, however, at one time suggested that if the creditors are paid, and the question becomes merely one between the two bodies of shareholders, different considerations may apply. This is not so. The statute enforces on all alike conformity with the rule that a share of a fixed amount makes the person who holds it liable for the amount. An article authorising issue of shares at a discount is a nullity; the company has no power to agree that some sum less than the nominal amount of the share shall be the only sum which the shareholder shall be asked to pay. The holder of the discount share must accordingly, for the purpose of adjusting the rights of the shareholders in the assets of the company, be treated as mere holder of a partly paid share."

But, while this is so and because it is so, it was contended by Mr. Hellmuth that, while the agreement was void, the application and issue of shares to the defendant McBean were valid, and the only remedy was by the company against McBean for the balance due upon the shares, and such proceedings might be taken by the company in case of non-payment. In short, that the transaction as a whole could not be set aside. I am not of this opinion. It is true that in many cases it has been held that where the shareholder has held the shares and accepted dividends it is too late to object when the company is being wound up: *In re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, 75. But it by no means follows that the shareholder may not attack the whole transaction as *ultra vires* and void. There is nothing in the Ontario Companies Act which authorises the issue of shares at a discount, except mining shares (sec. 141). It is true, as appears in the above cases, that where it is in the interest of the company, especially in winding-up proceedings, the holder of so-called paid-up shares illegally issued may be put on the list of contributories for the unpaid balance. But here the shares were issued in pursuance of an agreement whereby they were to be held for the purpose of being given to those who

1910  
D. C.  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.  
Clute, J.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.  
Clute, J.

subscribed for preferred shares provided for in the supplementary letters patent. It was a trafficking by the company in the shares of the company for an illegal purpose, and *ultra vires* of the company. In such a case the authorities are clear that the Court will interfere to prevent or set aside the illegal act: *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.*, 1 Ch.D. 682; *Hope v. International Financial Society*, 4 Ch.D. 327; Buckley's Company's Law, 9th ed., p. 613.

In the view I take, it is unnecessary to deal with the question of the legality and powers of the executive committee that assumed to make the allotment, although there are grave difficulties in the way of supporting their appointment and the allotment which they assumed to make of the shares in question.

The agreement of the 16th June, 1908, and the pretended allotment and issue of the said shares, should be set aside and cancelled.

The plaintiffs are entitled to costs.

The defendants the company and J. A. Currie appealed from the judgment of CLUTE, J.

April 6 and 7. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*F. E. Hodgins*, K.C., for the appellants. The trial Judge was not justified, on the evidence submitted on behalf of the plaintiffs, in coming to the conclusions which he did. The judgment is erroneous in setting aside the allotment of the stock and the agreement; it should have retained McBean as a shareholder, allowing the directors to deal with or forfeit the stock if deemed advisable. The remedy given by the trial Judge was wrong, the utmost limit to which he should have gone being to declare McBean liable for the stock, and that the same was not paid-up. The plaintiffs had no right to maintain the action, the company not being party plaintiffs, and it not sufficiently appearing that the plaintiffs were in a minority. The issue of the stock to McBean and its acceptance by him constituted a valid contract between him and the company which it was not within the power of the Court to disturb. I refer to *In re Bank of Syria*, [1900] 2 Ch. 272, affirmed in [1901] 1 Ch. 115; *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125; *In re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9; *In re Theatrical*

*Trust Limited*, [1895] 1 Ch. 771; *In re Crenver and Wheal Abraham United Mining Co., Ex p. Wilson* (1872), L.R. 8 Ch. 45; *Hamilton v. Desjardins Canal Co.*, 1 Gr. 1, at pp. 19, 20, 21, 24, and 26; *Burland v. Earle*, [1902] A.C. 83; *Henderson v. Blain* (1891), 14 P.R. 308; Buckley's Companies Acts, 9th ed., p. 612; *Russell v. Wakefield Waterworks Co.*, L.R. 20 Eq. 474; *Gluckstein v. Barnes*, [1900] A.C. 240; *In re Wragg Limited*, [1897] 1 Ch. 796; *Township of Barton v. City of Hamilton* (1909), 13 O.W.R. 1118.

C. A. Masten, K.C., for the plaintiffs. The whole transaction was *ultra vires* the company, because the transaction was one and indivisible, and was entered into for an illegal and fraudulent purpose, and was in its nature outside the powers of the company. There was no valid allotment, and nothing passed by the pretended issue of the stock in question. If the stock did pass, what took place was in effect buying back or trafficking in the company's stock; it was an attempt to issue stock at less than its par value. The action was rightly constituted. Under the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 82 (O.), while the board of directors could delegate powers in certain cases to executive committees, yet they could not abdicate all their powers and functions. The transaction was by an executive committee only, and that executive was not properly appointed at any regular meeting. I refer to *In re Alkaline Reduction Syndicate Limited* (1896), 45 W.R. 10; *Mosely v. Koffyfontein Mines Limited*, [1904] 2 Ch. 108; *Re Lake Ontario Navigation Co.* (1909), 20 O.L.R. 191; Cook on Corporations, 6th ed., vol. 1, secs. 31, 41, 46; *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, at p. 136; Buckley's Companies Acts, 9th ed., p. 613; *Ritchie v. Vermillion Mining Co.* (1901), 1 O.L.R. 654, and in appeal (1902), 4 O.L.R. 588; *Hattersley v. Earl of Shelburne* (1862), 31 L.J. Ch. 873.

June 13. RIDDELL, J.:—The learned trial Judge allowed an amendment permitting the plaintiffs to sue on behalf of themselves and all other shareholders of the company, and this amendment has been made.

At the trial the only *vivâ voce* evidence adduced was that of two witnesses, Schneider and Saddington. The examinations for discovery of the defendants Currie and McBean were also read, of course against themselves only. Upon the appeal it was urged

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.  
Riddell, J.

that the learned trial Judge must have taken into consideration, against the company, these examinations, and this was made one ground of complaint. It was suggested to counsel for the plaintiffs that he should take an enlargement so as to have the evidence of McBean and Currie available against the company, and that of McBean available against Currie. He declined to do so, and insisted upon resting the case upon the evidence already in. We have no power to compel either side to call a witness, and cannot, without the consent of the parties, ourselves call a witness. The law has recently been put in a more satisfactory state by the Court of Appeal in *In re Enoch and Zaretzky's Arbitration*, [1910] 1 K.B. 327.

It, therefore, becomes necessary for us to examine the evidence which is admissible against the company and Currie respectively, without the assistance of that which, though given at the trial by reading the examinations for discovery, is not so available. This is to me a very unsatisfactory proceeding, as the Court would in all cases prefer to be placed in possession of all the evidence available, so as to be able to do justice, not only upon the evidence, but also upon all the facts. We, however, have no other course open to us than that indicated.

The books mentioned in sec. 113 of the Ontario Companies Act are made evidence in any action or proceeding against the company or any shareholder (sec. 119); how far the other books and papers produced by the company are evidence against the company or Currie we need not inquire, as counsel agreed that they could be used as evidence of the facts. There might otherwise, perhaps, have been some difficulties: Taylor on Evidence, 9th ed., sec. 1781; Phipson on Evidence, 3rd ed., ch. 34.

Then, as against the company, we must examine the documents with the *vivâ voce* testimony of Schneider and Saddington, everything being denied on the pleadings.

The company was incorporated in 1901, under the Ontario Companies Act, with capital \$700,000, head office, Perth, Ontario, as the Pressed Steel Car and Wheel Company. By order in council in January, 1903, the name was changed to the Imperial Steel and Wire Company, and, by by-law in the same month, the head office was removed to Owen Sound, the defendant Currie taking a prominent part in the affairs of the company from the beginning.



By-law No. 3, passed on the 16th January, 1903, directed that 20,000 of the 70,000 shares be issued as preference stock, carrying a dividend of 7 per cent. per annum and priority in liquidation; on the 15th January, 1903, an executive committee was formed of three members, and empowered "to do and perform all acts, matters, and things that are vested in the directors of the company . . . with the limitation only that . . . such executive committee . . . report from time to time to the board of directors when in session . . ." This was done under the authority of the by-laws, sec. 11: "The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit . . ." Objection to this delegation becomes immaterial by reason of subsequent transactions.

At the general meeting of the company in June, 1904, a new by-law, sec. 11, was passed, in the same terms as the former; and sec. 15: "Reasonable notice of directors' meetings shall be given to each director personally or by letter addressed to each director at his last known address."

In June, 1904, and again in June, 1905, a new executive is appointed with the same powers and limitations as before, and again in June, 1906. In this last month the directors speak of the need of more capital.

In March, 1907, the plaintiff W. J. Lindsay was appointed acting secretary.

In February, 1907, the executive committee met a deputation from Fort William concerning a proposition to erect a wire mill at that place, and a memorandum of an agreement with Fort William was read at the meeting in March, 1907, and the president and secretary authorised to execute it for the company. The directors in June, 1907, thought that they would be justified in giving a dividend of at least 10 per cent. to the preference shareholders.

On the 22nd July, 1907, the board discussed the agreement with the Town of Fort William and read a by-law authorising them to issue bonds of the company for \$100,000, and to secure the same by a mortgage on the company's property at Fort William. I am unable to find anything shewing the terms of the agreement; no doubt they are immaterial.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.  
Riddell, J.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.  
Riddell, J.

Also on the 22nd July, 1907, the board adopted and sent on to a general meeting a by-law to increase the capital stock to \$1,500,000, by "the issue of \$500,000 or 50,000 shares of new common stock of the par value of \$10 each, which may be issued as a bonus, shares (*sic*) for share, and by the issue of \$300,000 or 30,000 shares of new preferred stock of the par value of \$10 each, which will be sold for cash," and "that the new shares, both common and preferred, be issued and allotted in such manner and proportion as the directors of the company may deem proper for the benefit of the company," the new preference stock to be preference stock *pari passu* with the then existing preference stock, which, it is stated, amounted to \$699,390. At a numerously attended general meeting held on the 22nd July, 1907, both by-laws were duly passed, the word "share" being substituted for "shares" at the (*sic*) above.

I cannot find any evidence to shew why this increase of stock was authorised, the recital being: "Whereas for the due carrying out of the objects of the company it is deemed expedient that the said capital stock should be increased to the sum of \$1,500,000." The report of the board to this meeting speaks of the agreement with Fort William, but does not mention the terms or in any way connect the by-laws with the agreement; dividends are, however, suspended. At a meeting of the board of directors, after the general meeting, an executive committee for the ensuing year is appointed, composed of Currie, W. J. Lindsay (one of the plaintiffs), and Schneider (another plaintiff). The powers and limitation are the same as before, and "any two of the committee to form a quorum to act, notwithstanding the absence of any one of them." At this meeting also the salary of the secretary (the plaintiff W. J. Lindsay) is fixed at \$100 per annum.

In December, 1907, as he says, Schneider resigned from the executive committee, but at a meeting of the full board, on the 18th February, 1908, he was reappointed. At the same meeting the Fort William matter again came up. On the 9th March, 1908, W. J. Lindsay and Schneider, on the executive committee, complain of the general manager, Currie, not supplying information, and, in May, Lindsay and Schneider, at a meeting of the executive committee, resolved that a meeting of the board should be called to consider the manner in which the manager was withholding in-

formation. Schneider in his evidence says that the information he and Lindsay could get "was just as good as nothing."

On the 6th May, 1908, Currie, the president, sent out a notice of meeting of the board for the following day at Collingwood at 2 p.m. Schneider, who lives at Hamilton, got this notice at 8.30 p.m., it having come to his house at 5.30 p.m. In order to get to Collingwood for the meeting, he must leave Hamilton at 7 a.m. He had other business to attend to; and, not being able to get the people with whom he had business by telephone that evening and not being able to find them in the morning, he did not go to the meeting. It does not appear that he telephoned to Collingwood or made any effort to procure an adjournment of the directors' meeting; he simply telegraphed, "Could not arrange matters this morning before train time." His other business was more important to him than that at Collingwood, and he preferred to attend to the former. It is now contended that this was not "reasonable notice" under the by-laws, sec. 15. Saddington, another director, apparently received notice too late to be able to attend at all. At this meeting four directors were present, *i.e.*, all but W. J. Lindsay, Schneider, and Saddington, and a resolution was passed dispensing regretfully with the services of W. J. Lindsay from that date, but that his salary should be paid in full until the end of the year.

Counsel for the plaintiffs informs us that this is the beginning of the trouble resulting in this law-suit. The services of the executive committee were also dispensed with, and their appointment and power cancelled. Then the four directors appointed themselves a finance and building committee of the directors for the remainder of the year, "and that such committee be and are hereby (empowered) to do and perform all acts, matters, and things that are vested in the directors under the by-laws of this company and the Act . . . with this limitation only, that it shall be the duty of such committee to report from time to time to the board of directors when in session, any three of the committee to form a quorum to act, notwithstanding the absence of any one of them." It will be seen that the powers of this proposed committee are the same as those of the executive committee from its beginning in 1903.

At the trial counsel for the plaintiffs said he did not criticise the power of the directors to delegate all their functions, but before us he raised the objection that such a delegation was not authorised

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.  
Riddell, J.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.  
Riddell, J.

by the statute. I do not think the plaintiffs should be precluded now from raising the point, if it be tenable, for reasons given in *Kendrick v. Barkey* (1907), 9 O.W.R. 356, at p. 361.

At the next meeting of the board, held on the 14th May, Schneider and W. J. Lindsay attended, as did the four who had been at the meeting of the 7th May, thus making a full attendance except Saddington. He says it was impossible for him to attend, by reason of the notice arriving too late, as before. At this meeting the line of cleavage on the board is apparent, W. J. Lindsay and Schneider being one party, and the other four the other. On a division, in which the plaintiffs formed the minority, the proceedings of the meeting of the 7th May were approved and confirmed.

On the 18th June, 1908, a meeting of what is in the minutes called the executive committee, *i.e.*, the finance and building committee, was held, at which were present Currie, S. H. Lindsay, and McKay: the president Currie stated that supplementary letters patent had been issued, increasing the capital stock to \$1,500,000. A subscription was received from George M. McBean for 50,000 shares. This is the first appearance of McBean upon the minutes; and it is the transaction with him which gives rise to this action. The learned trial Judge says, "McBean is a man of no means." I cannot find any evidence as to his financial condition—he may have been a Croesus for anything that appears. It was resolved that 50,000 shares of the common stock of the company be allotted to McBean in accordance with his application of the 16th June, 1908.

Amongst the exhibits in the action, there is an agreement between McBean and the company, reciting that he "is in possession of certain new and valuable discoveries in connection with the process of wire-drawing . . . more particularly described in schedule hereto annexed marked A., and . . . has agreed to transfer his interest in said . . . discoveries to the . . . company, in consideration of the transfer to him of 50,000 shares of common stock of the company, on the terms and conditions hereinafter set forth." The agreement provides that he is immediately to apply for 50,000 shares of common stock; he is to be called upon to pay over at once only \$10, being the par value of one share—to transfer to the company all his rights for Canada and one-half interest in his rights for other countries. He is to transfer 40,000 shares to a person to be mutually agreed upon between himself



and the president of the company, so that the 40,000 shares, or such part thereof as may, in the sole discretion of the said person, be deemed necessary, may be given as a bonus to purchasers of preferred stock, as the said person may deem necessary or advisable to give to promote the sale of the remainder of the company's stock; the remaining 10,000 shares to be transferred to the said person, not to be delivered until a Canadian patent issues; and this person to have the sole right to vote on this stock—on the fulfilment of the agreement by McBean he is to be released from his liability on his application for shares of common stock of the company. This agreement being dated the 16th June, 1908, the same day as the application for stock, we must hold (as the learned trial Judge did) that the application was in pursuance of McBean's obligation to apply for 50,000 shares of stock, especially as in the letter enclosing the subscription for stock is enclosed "the sum of ten dollars (\$10.00) part payment on same." If one is obligated by law or contract to perform any act, and does perform that act, he is presumed to have performed it in pursuance of his obligation. There is, consequently, ample evidence to justify the learned trial Judge in finding that McBean "was not expected to pay for the stock," if we add "in cash or in any other way except as mentioned in the contract." There is no evidence that these inventions had been owned by Currie or that they were not (or were) of very great value; nor is there any evidence that McBean was acting for any one but himself in the matter.

There is no evidence that the contract was entered into at the instance of Currie, or that it was entered into for any other purpose than appears upon its face; and there is nothing to connect it with the scheme proposed in June, 1907.

At the next meeting "of the (executive) building and finance committee," a resolution was passed "that the company purchase from George McBean the patents described in his agreement dated 16th of June, 1908, on the terms set forth in the said agreement, and that the performance on his part of said agreement be accepted in satisfaction of the balance due by him for common shares allotted to him on 16th of June, 1908." On the 30th June he signs a receipt for certificate No. 714 for 50,000 shares of the common stock of the company. At some time—when it does not appear—Anna M. B. Lindsay brought an action against Currie and the

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE Co.  
Riddell, J.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.  
Riddell, J.

company, obtained an injunction order from Mr. Justice Anglin, 27th May, 1908 (and this was continued 24th June, 1908, by Mr. Justice Clute), restraining the voting on certain shares at any meeting of the shareholders until the trial. These are, perhaps, the same shares as are in question in this action; but we are not informed, and I can find no evidence.

This action was begun—when does not appear, the Rules of practice have not been observed in the statement of claim—but, no doubt, before the 21st July, 1908, as upon that day, at a meeting of the board, “the order of the Court was read adjourning the annual meeting over pending the trial of the suit of W. J. Lindsay against the company.” We are told that the company is a going and successful concern.

The action was originally brought by Anna M. B. Lindsay, W. J. Lindsay, and William Henry Schneider, in their own names, against the company, Currie, and McBean. It is said that McBean’s defence was struck out, but afterwards he put in a defence: he did not appear at the trial. As has been said, an amendment has been made allowing the plaintiffs to sue in a representative capacity as well.

The prayer is for a declaration that the transfer to McBean is null and void, and that the stock should be retransferred to the company; a declaration that the issue of the \$800,000 additional stock is a fraudulent and illegal issue and that the same be cancelled; and other relief, not necessary here to be mentioned. The case having been tried as stated, judgment has been entered: (1) declaring the allotment and issue of the 50,000 shares to McBean *ultra vires* the company and illegal; (2) setting aside the allotment and issue, and directing McBean to deliver up the certificate to be cancelled; (3) adjudging a rectification of the register of the company accordingly; (4) declaring that the agreement is *ultra vires* the company and null and void; (5) ordering the defendants to pay the costs.

The company and Currie now appeal.

The chief objection, or perhaps one of the chief objections, taken, is as to the right of the plaintiffs to maintain this action at all; and both parties accept—and properly accept—as sound law the proposition to be found in Buckley’s Companies Acts, 9th ed., p. 613: “In any proceeding brought to redress a wrong done to the

corporation or to recover property of the corporation, or to enforce rights of the corporation, the corporation is the only proper plaintiff;" but "a single shareholder suing on behalf of himself and others, or suing alone and not on behalf, may make the company a defendant, and may restrain the company and directors from doing an act which is illegal, or criminal, or *ultra vires* the corporation, and which a majority are consequently unable to affirm . . . If, however, a majority are opposed to the illegal act, *quære* whether the company should not be made or at any rate joined as plaintiff." And, while the many instances of what are contended to be irregularities were mentioned as indicating looseness in the management of the company, they were not much relied upon as a ground of attack. I have set them out, so that it may not be thought that they have been overlooked; but it is quite clear, on the authorities, which need not be again mentioned, that, if the acts complained of were *intra vires* the corporation, this action cannot succeed. It will be necessary, therefore, to inquire whether the issue of the 50,000 shares of stock was or was not so *intra vires*. From the books it appears that this stock was issued to McBean and the credit entries are: cash, \$10; sundries, \$499,990 = \$500,000.

We have no evidence to indicate that the agreement attacked was not entered into in good faith, no evidence as to the financial standing of McBean, or as to the value of the patents; it is said that the common stock was and is worthless, though of that there does not seem to be any satisfactory evidence.

But Mr. Masten relies upon the case of *In re Alkaline Reduction Syndicate Limited*, 45 W.R. 10, as shewing that this agreement is, *ipso facto*, *ultra vires* the corporation. In that case it was proved that some twenty-two or twenty-three friends of the vendors undertook to subscribe for cash shares, an agreement having been filed providing for the payment of 75 out of the 100 shares of the company for certain patents and property agreed to be sold to the company. Shortly before the first meeting of the board, it was suggested that the price payable to the vendors was too large, and that they would have too high a voting power, and that the vendors, as providing the property, and the subscribers, as providing the cash, should have equal shares. To carry this out, the vendors agreed to give up 25 of the 75 shares, to be distributed *pro ratâ* among the cash subscribers, and resolutions to that effect were passed. An agree-

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.  
Riddell, J.

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.  
Riddell, J.

ment was accordingly drawn up modifying the original agreement by adding, "Of the said 75 shares the vendors shall distribute 25 shares among the several" cash subscribers *pro ratâ*. This was approved by a special general meeting. No charge of fraud was made—and the sole question was as to the liability of the recipients of the 25 shares to pay for them on a winding-up. The latter agreement was held to be the only real agreement; and in the result the Court held that the cash subscribers who had received the 25 shares were liable as unpaid shareholders, on the ground that the transaction was in reality a gift by the company to them, and this was beyond the powers of the company. The Court held further that no question of estoppel arose against the company from the issue of the shares as fully paid-up. There is no holding that the issue of the shares was *ultra vires* the company; but the case was one under the Winding-up Act.

In the present case, without going beyond the evidence admissible, it seems to me that it would be an abuse of language to call the 50,000 shares of common stock the purchase-price of the inventions—the language is not that the stock is to be issued to McBean in payment for the inventions—his interest in the inventions is to be transferred to the company "in consideration of the transfer to him of 50,000 shares . . . on the terms and conditions hereinafter set forth." He is to apply for 50,000 shares, paying only \$10, and to transfer 40,000 shares of these to a person mutually agreed upon between himself and the president of the company, so that such person may in his discretion use them as a bonus to purchasers of preferred stock. I think this must mean purchasers from the company, so that the company may have the advantage of this stock so far as may be necessary—it is true that the amount to be so used is to be in the discretion of the person so chosen, but there can be no doubt of the intention that it is to be for the benefit of the company. Ultimately the recipients of this stock will receive the stock from the company, although not directly—and the recipients will receive this stock without paying for it. It is simply an indirect method of selling the company's preferred stock with a bonus from the company of common stock. This is "a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount," to use the language of Lord Watson in the *Ooregum Gold Mining Co.* case,



[1892] A.C. at p. 137, and is *ultra vires* of the company: *Mosely v. Koffyfontein Mines Limited*, [1904] 2 Ch. 108. But I do not think (on the available evidence) that the whole contract is void—it seems plain that the real price for the inventions is the 10,000 shares referred to in clause 3 of the contract—and I cannot see why McBean is not entitled to have the real consideration for the inventions. In short, I read the contract as in reality double—one an agreement for the inventions for 10,000 shares, and the other a colourable arrangement made to enable the company to deal with its shares illegally. These are quite separable; and, the company not being in liquidation, there can, in my view, be no objection to a declaration that the \$10,000 be treated as paid-up upon the event happening which is referred to in the 3rd clause of the agreement. We cannot go into the propriety of such an agreement, having no evidence of value or other evidence of fraud, even if the action should be considered properly constituted: *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125; *In re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9; *In re Wragg Limited*, [1897] 1 Ch. 796; and many other cases to the same effect.

This case is not like the recent case in the Court of Appeal, *Re Lake Ontario Navigation Co.*, 20 O.L.R. 191. There D. made an application for 130 shares of stock (of the par value of \$13,000), agreeing to pay therefor the sum of \$1,300 “on condition that no further call be made thereon.” This was accepted, but no written notice given D. He gave his cheque, but, finding objection taken at a meeting of the company, he at once stopped payment of the cheque and repudiated the whole transaction—he did not receive a certificate. It was held that he was not liable. In that case an illegal bargain was repudiated before it was acted upon by the delivery of a certificate, and the contract was entire and single. In the present case a certificate for 50,000 shares has been delivered to McBean, 10,000 for himself and 40,000 for delivery over to a trustee, and the contract is double and separable.

I cannot see why either he or the company may not insist on the real contract being carried out for the purchase of the inventions for 10,000 shares, leaving void what was tacked on the contract for the illegal purpose already spoken of. Unless McBean and the company agree (as they may) to cancel the whole transaction—and this would perhaps be found the preferable course—there

D. C.  
1910  
LINDSAY  
v.  
IMPERIAL  
STEEL  
AND  
WIRE CO.  
Riddell, J.

D. C.  
 1910  
 LINDSAY  
 v.  
 IMPERIAL  
 STEEL  
 AND  
 WIRE CO.  
 Riddell, J.

should be a declaration accordingly. In any case there should be no costs of this appeal, but in the Court below the disposition of costs should stand.

I think we can make this order notwithstanding the fact that McBean has not appealed. Where the effect of a judgment upon the appeal of one defendant is to establish the validity of a transaction between two defendants, then the transaction may so be declared valid in respect of the other, even if that other does not appeal.

In *Webb v. Hamilton* (1907), 10 O.W.R. 192, this Divisional Court was inclined to hold the non-appealing defendant for the costs awarded against him at the trial, but found that the practice would not permit of such a course. We therefore, upon settlement of the judgment, relieved this defendant from the costs awarded against him by the trial Judge, and vacated the judgment as against him.

BRITTON, J.:—I agree in the result.

FALCONBRIDGE, C.J.:—And I also.

---

[DIVISIONAL COURT.]

D. C.  
 1910  
 June 14.

THOMPSON V. BIG CITIES REALTY AND AGENCY CO.

*Pleading—Counterclaim—Order Striking out—Practice—Convenience—Connection with Cause of Action—Con. Rules 254, 261—Set-off—Promissory Notes—Company—Signature—Abbreviations—Powers of Officers—Stay of Proceedings on Judgment for Plaintiff pending Trial of Counterclaim.*

To an action upon four promissory notes made by the defendants, an incorporated company, the defence was that the defendants had received no money by way of loan; that the notes were not binding; that they were made without consideration; that the plaintiff and one D. had agreed to deal together in real estate, and that any money advanced by the plaintiff had been advanced to D.; that the notes had been procured by the plaintiff from the defendants by conspiracy with D., under the representation that the defendants owed the plaintiff; that the plaintiff and D. and D.'s wife, having agreed to purchase and deal in real estate, used the pretended loan and other moneys and assets of the defendants for such purposes; and the defendants counterclaimed against the plaintiff and D. and his wife, as defendants by counterclaim, for an account of all moneys wrongfully used by them, for a refund, and for further and other relief:—

*Held*, that the counterclaim was properly pleaded, and should not have been struck out at the trial, either under Con. Rule 261 or Con. Rule 254; it was not made to appear that the claim and counterclaim could not be conveniently tried together.

Discussion of the practice and authorities in respect of counterclaim and set-off.

*Held*, also, that, even if an order striking out the counterclaim could be supported, it would be proper to stay the execution of the judgment obtained at the trial against the defendants until the dealings of the plaintiff with the property of the defendants should be investigated; and that relief should be given to the defendants upon appeal from the order striking out the counterclaim, the judgment at the trial in favour of the plaintiff upon his claim being affirmed; and that judgment to stand for the protection *quantum valeat* of the plaintiff.

*Auerbach v. Hamilton* (1909), 19 O.L.R. 570, followed.

The notes were signed with the name of the defendant company, the words "Company" and "Limited," which were both part of the name, being abbreviated to "Co." and "Ltd.:"—

*Held*, that the notes were signed in the name of the company.

*Held*, also, that the plaintiff, having received the notes in good faith, and having nothing to do with the management of the company, was not affected by the alleged absence of proof that the persons who appeared to have affixed the name of the company to the notes were those having power to do so.

*Held*, also, upon the evidence, that the company were liable upon the notes. Judgment of SUTHERLAND, J., upon the plaintiff's claim, affirmed.

Order of SUTHERLAND, J., striking out the counterclaim, reversed.

APPEAL by the defendants from an order of SUTHERLAND, J., made when the action came on for trial, striking out the defendants' counterclaim, and from the judgment of SUTHERLAND, J., at the trial, in favour of the plaintiff upon his claim in the action.

The action was upon four promissory notes made by the defendants, an incorporated company. The defence was that the defendants had received no money by way of loan; that the notes were not binding; that they were made without consideration; that the plaintiff and one Drake had agreed to deal together in real estate, and that any money advanced had been advanced to Drake; that the notes had been procured by the plaintiff from the defendants by conspiracy with Drake, under the representation that the defendants owed the plaintiff; that the plaintiff and Drake and Drake's wife, having agreed to purchase and deal in real estate, used the pretended loan and other moneys and assets of the defendants for such purposes. The counterclaim was against the plaintiff and the Drakes, as defendants by counterclaim, for an account of all moneys wrongfully used by them, for a refund, and for further and other relief.

The counterclaim was struck out upon the motion of the Drakes, and judgment was given for the plaintiff against the defendants for \$1,192.50 and costs.

May 25 and 26. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

D. C.

1910

THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.

D. C.  
1910  
THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY CO.

*T. Hislop*, for the defendants. The defendants appeal against the order of the trial Judge striking out the counterclaim, and also against his judgment in favour of the plaintiff in the action. The transaction between the parties was not a borrowing of money by the defendants from the plaintiff, but an intrusting of money by the plaintiff to the defendants for the purpose of investment. The money was drawn out by Drake, one of the defendants by counterclaim, as president of the defendant company, and used by him in the purchase of real estate in accordance with an agreement between the plaintiff and the defendants. The defendant company were entitled to have the issue raised by their counterclaim tried, and the trial Judge erred in striking it out without hearing the evidence which the defendants were prepared to adduce: see Con. Rule 254; *Holmsted & Langton*, 3rd ed., p. 456. As to the main action, the notes sued on are not the notes of the defendant company, the name of the company being wrongly given therein: *Penrose v. Martyr* (1858), E. B. & E. 499; *Atkin v. Wardle* (1889), 61 L.T.R. 23; *Nassau Steam Press v. Tyler* (1894), 70 L.T.R. 376; the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 27. Reference was also made to *Farmers Bank v. Big Cities Realty and Agency Co.* (1910), 15 O.W.R. 241, 1 O.W.N. 397; *Boyd v. Mortimer* (1899), 30 O.R. 290, at pp. 296, 297, and to the case there cited of *Alexander v. Sizer* (1869), L.R. 4 Ex. 102.

[THE COURT, on the conclusion of counsel's argument, intimated that argument from the respondents would only be required as to the alleged appropriation of the moneys sued for to the purchase of real estate for the plaintiff's benefit, and as to the striking out of the counterclaim.]

*Joseph Montgomery*, for the plaintiff, argued that there was no connection between the money used in the purchase of the Manning avenue property and the money advanced by the plaintiff on the security of the defendants' notes. The motion to strike out the counterclaim was not made by the plaintiff.

*W. C. Mackay*, for the Drakes, defendants by counterclaim. The counterclaim is not within the scope of sec. 57, sub-sec. 7, of the Ontario Judicature Act: *Dunlop Tyre Co. v. Ryckman* (1902), 5 O.L.R. 249; *General Electric Co. v. Victoria Electric Light Co. of Lindsay* (1895), 16 P.R. 529. The discretion of the trial Judge in excluding the counterclaim should not be interfered with: *Hug-*



*gons v. Tweed* (1879), 10 Ch. D. 359. It is evident from the whole circumstances of the case, and from the evidence given at the trial, that the counterclaim is frivolous and vexatious, and the trial Judge was right in striking it out.

*Hislop*, in reply.

June 14. RIDDELL, J.:—On the 15th April, 1909, the plaintiff sued the defendants, a joint stock company, upon four promissory notes; and delivered his statement of claim on the 31st May. On the 9th June, 1909, the defendant filed a statement of defence and counterclaim, bringing in by counterclaim one Drake and his wife. The company set up that they had received no money by way of loan; that the notes were not binding, and that they were without consideration; that the plaintiff and Drake had agreed to deal together in real estate, and that any money advanced had been advanced to Drake; that the notes had been procured by the plaintiff from the company by conspiracy with Drake, under the representation that the company owed the plaintiff. All the above would, of course, be admissible as a defence to the action upon the notes. But the company go on to say, that the plaintiff and Drake and Mrs. Drake, having agreed to purchase and deal in real estate in Toronto, on Mutual street, Manning avenue, and other parts unknown to the company, used the pretended loan and other money and assets of the company for such purposes. The company claim, therefore, that the plaintiff Drake and Mrs. Drake account for all money so wrongfully used by them, and ask for a refund, and also “such further and other relief as the nature of the case may require and the facts in evidence may warrant.” On the 12th June, 1909, the plaintiff joins issue on the statement of defence and on the counterclaim. Drake and wife put in a statement of defence to the counterclaim on the 23rd June, 1909, denying all the charges, but say that, if any money, etc., of the company was appropriated by them, they had returned it before service upon them of the counterclaim. The company replied on the 15th July, 1909, denying redelivery. (On the 12th June the Drakes had put in a simple joinder, but this seems to have been got rid of in some way, as it does not appear in the certified copy of the pleadings.) A motion for speedy judgment seems to have been made by the plaintiff in May or June, 1909,

D. C.

1910

THOMPSON

v.

BIG CITIES

REALTY

AND

AGENCY Co.

D. C.  
 1910  
 THOMPSON  
 v.  
 BIG CITIES  
 REALTY  
 AND  
 AGENCY Co.  
 Riddell, J.

but no other proceedings were taken until October, 1909, when the president of the company was examined on behalf of the plaintiff. Then nothing seems to have been done until the 4th March, 1910, when Drake was examined on behalf of the company, the plaintiff and Drake both being represented on the examination. The case being on the list for trial at the non-jury Court, the Drakes obtained, on the 8th March, 1910, from my brother Sutherland, the trial Judge, leave to serve notice of motion before that learned Judge, "or other the Judge who shall preside at the trial hereof at the court house in . . . Toronto, on Thursday the 10th day of March, 1910, . . . for an order striking out the claim of the company as against the said Drakes by counterclaim," on the grounds: "(a) that the matters set up in the said claim against them are not proper subject-matters of third party procedure; (b) that such claims are inconsistent with the defence set up to the plaintiff's claim in the action; (c) that there is no relation or connection between the matters on which the plaintiff's claim is based and the subject-matter of the said counterclaim; and (d) that the claims in the action and by counterclaim are not such as can be conveniently tried together; . . . and for . . . costs. . . ."

On the 10th March the motion was made before the learned Judge sitting as trial Judge—the plaintiff seems to have taken no part in the proceedings—and an order was made striking out the counterclaim, with "costs of this motion and of pleading to the said counterclaim forthwith after taxation thereof." The case was then proceeded with, and judgment given against the company for \$1,192.50 and costs.

The defendants now appeal both from the order striking out their counterclaim and from the judgment against them.

It was suggested on the argument that the enforcement of the judgment should be stayed and the matter of the counterclaim tried during the week of June, 1910. The plaintiff and defendants consented to this, but the Drakes refused, and insist upon their strict legal rights. We must, therefore, determine what these rights are.

The material spoken of in the notice of motion is: (1) the affidavit of Drake; (2) the examination for discovery of Drake; (3) the books of record and account of the company; and (4) the

pleadings and proceedings in the action. The affidavit says that, as the books shew, Mrs. Drake only had one transaction with the company, and that was in respect of a house on Mutual street, bought by the company, but conveyed to her—that the company at all times received the rents, etc., of this property, and finally sold it—that “the said books and records shew that the property aforesaid was the only property, etc., of the company that ever came to her hands . . . and that she has not now and never had any property . . . of the company save as aforesaid. . . .” No affidavit is produced from Mrs. Drake, and no affidavit of any fact except that books *shew*, etc.

It may be that sometimes the books of a company may be evidence against the company, but such evidence is not conclusive against the company, and certainly not in an action against the president and manager of the company, under whose direction all the books were kept. The affidavit goes on to say that Mrs. Drake never had any dealings with the plaintiff, and that he, Drake, has not in his possession, name, or under his control any property of the company, “as appears by the said books and records,” and that he is “in no way indebted to or accountable to them.” In the examination for discovery of Drake he, indeed, does swear that the whole connection his wife had with the company was to allow the company to use her name. She signed the agreement, and on the sale a cheque was given to her by the purchaser. She indorsed it and handed it over to the company, and the company used it.

It may be that, if the statements of this witness, Drake, are accepted as true, the counterclaim is set up simply as a form and is a mere sham, but the company’s counsel says that he has evidence to prove that Drake is not telling the true story, and that the truth is as set out in the counterclaim. At the hearing of the motion, he urged the learned trial Judge to take evidence on the transaction, and, when counsel for the Drakes says “there is no attempt to connect any transaction of Thompson for which he sues, with any transaction of the other defendants by counterclaim with the company,” counsel for the company says, “We will shew that.” His Lordship then says: “It seems to me that the plaintiff’s action should not be cumbered by the trial of the issues between the defendants and the Drakes. It is a plain

D. C.  
1910  
THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.  
Riddell, J.

D. C.  
1910  
THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.  
Riddell, J.

action, as far as he is concerned, and there are certain defences, so far as the parties are concerned, set up by the statement of defence. I think those issues would be very much better tried by themselves. It appears by the argument and the material filed upon the argument of this motion, that there are apparently issues which are independent to be tried as between this defendant company and the Drakes, and I think that, properly speaking, the counterclaim should be struck out, and the defendants the company and the Drakes be left to litigate their own matters between themselves. I make an order allowing the motion."

In this it seems to me the learned Judge has either omitted to take note of the fact that it is not the Drakes alone that the company are claiming against, or has intended to decide without hearing evidence, and upon the statement upon affidavit and examination of the one side only, that the company have no counterclaim against the plaintiff. No doubt, if the matters to be tried were only between the company and the Drakes, the counterclaim was irregular and improper—the counterclaim must claim relief against those brought in and the plaintiff: *Con. Rule 248*; *Treleven v. Bray* (1875), 1 Ch. D. 176; *Turner v. Hednesford Gas Co.* (1878), 3 Ex. D. 145; and similar cases. In the present case, however, the claim is against the plaintiff and those brought in; so there is no difficulty in that regard.

I do not think it competent for a Court to determine upon the shewing of one side that the claimant has no real claim. No doubt the Court may and does strike out a counterclaim which is plainly frivolous or vexatious; but in that respect a counterclaim does not at all differ from any other pleading, and the power of the Court is exercised under *Con. Rule 261*.\* Such a case was *Lee v. Ashwin* (1885), 1 Times L.R. 291, in which the defendant counterclaimed; by particulars delivered by him, the Court had no doubt that the counterclaim was put forward simply for the purpose of making scandalous charges against the plaintiff, which could not form a cause of action (being *turpis causâ*), and consequently the counterclaim was not *bonâ fide*, but was an abuse of the practice of the Court.

\*261. A Judge of the High Court may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.



The rules governing the striking out the counterclaim for such reason are precisely the same as is the case with other pleadings. Jurisdiction under this Rule is to be exercised with caution, and the improbability of the facts is not as a rule material; their truth is to be presumed. And, while affidavits may be admitted, as a rule only the pleadings will be looked at. See the cases in *Holmsted & Langton*, pp. 469, 470.

Unless there is something equivalent to an admission on the part of the party pleading, *e.g.*, statements on the examination for discovery, statements of his counsel, evidence in another action, or something of that sort, the power will not be, except in an extraordinary case exercised. Certainly no such case is made here.

And the same rule applies where it is sought to strike out a pleading under the other part of Con. Rule 261.

Moreover, in applying this Rule, the motion should be made promptly—preferably, indeed, before pleading: *Attorney-General v. London and North Western R.W.Co.*, [1892] 3 Ch. 274; although it may be even after the close of the pleadings: *Tucker v. Collinson* (1886), 34 W.R. 354, 16 Q.B.D. 562; and where not made till after the close of the pleadings, and the case is set down for trial, the Court will, as a rule, consider that there has been undue delay and will refuse the motion: *Cross v. Howe* (1892), 62 L.J.Ch. 342.

It has been suggested that we should look at the evidence taken at the trial in order to satisfy ourselves that the counterclaim is frivolous and vexatious. I do not at all agree. In the first place, if the application is under Con. Rule 254,\* it must be made before trial, and so the Con. Rule says in express terms: while, if under Con. Rule 261, it must in general also be made before trial.

But, while this evidence was not before my brother Sutherland upon the application, I do not at all say that, though his order was wrong when made, an appeal from it should be allowed if it

\*254. Where a defendant sets up a counterclaim, if the plaintiff, or any other person named . . . as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may, at any time before trial, apply to the Court or a Judge for an order that such counterclaim be excluded; and such order may be made as may seem just.

D. C.  
1910  
THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.  
Liddell, J.

D. C.

1910

THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.  
Riddell, J.

now appear that the counterclaim was in fact one that should have been struck out.

Now, evidence was gone into at the trial which, if not contradicted or modified, would shew that there is no foundation for the counterclaim. The counsel for the company, however, informs us that he has and had other evidence which was not heard. It is true that such evidence does not seem to have been offered, but I am of opinion that this evidence could not have been received if it had been offered.

It may not be amiss to state again and in the lowest terms the pleadings under consideration. The plaintiff says to the company, "You owe me some money on your promissory notes"—the company reply: "We do not; but, if we do, you and the Drakes have taken that money represented by these notes, and more, and put it into land in your names—and we want an account of all moneys, etc., you and they have taken, and whatever relief the facts entitle us to."

It is plain that this wrongful taking of the company's money, etc., cannot be pleaded as a payment upon the notes. "To constitute a payment the transaction must have the assent of both parties:" *In re Miron v. McCabe* (1867), 4 P.R. 171, at p. 174; *Osterhout v. Fox* (1907), 14 O.L.R. 599, at p. 604.

Nor could the matter have been raised by way of set-off. I do not go into the vexed and perhaps still unsettled question of the propriety of setting up what is merely a set-off in the form of a counterclaim. *Chamberlain v. Chamberlin* (1886), 11 P.R. 501, may be looked at—though the Con. Rule is now different—also *Girardot v. Welton* (1900), 19 P.R. 162, and other cases in *Holmsted & Langton*, p. 445. For this claim could not be a set-off. Since the Judicature Act much of the learning as to set-off has become obsolete—whether a claim can be set up by way of set-off is immaterial; there is always some way of having the matter disposed of. I venture to think no pleader before the Judicature Act would have pleaded this claim by way of set-off. For to allow such a plea the debts must be mutual and in the same right, and a joint debt by the plaintiff and another cannot be set off against a debt due from the defendant to the plaintiff solely: *Arnold v. Bainbrigge* (1853), 9 Ex. 153. Were this a case of a joint and several debt, like a promissory note, it would, of course, be different: *Owen v. Wilkinson* (1858), 5 C.B.N.S. 526.

There is, however, another consideration. The plaintiff and the Drakes are charged with taking the money of the company and putting it into land. A mere judgment for the money used might be of little avail, and a lien might have to be declared upon the land. This could, of course, be done, in the circumstances, under the prayer for general relief: *Watson v. Hawkins* (1876), 24 W.R. 884; *Newell v. National Provincial Bank of England* (1876), 1 C.P.D. 496, 501; *Duryea v. Kaufman* (1910), *ante* 161—but not in a defence simply of set-off in the original action, to which the Drakes are not a party. “The counterclaim of a defendant properly so-called is a claim by the defendant for a relief which cannot be obtained by him in the action which is brought against him, and in order to obtain which he must resort to a cross or independent action, and such cross or independent action, when set up by him to the action brought against him, is a counterclaim properly so-called.” These are the words used by Armour, C.J., in *Girardot v. Welton*, 19 P.R. 162, at p. 165, in a judgment which has pushed the doctrine of set-off to the utmost limit.

The relief then sought must be by way of counterclaim—and, as the counterclaim was struck out, evidence of the facts alleged by the company against the plaintiff and the Drakes could not have been admitted. The company’s counsel alleging that he has other evidence, it would be obviously unfair to decide against them on the evidence now available to the Court.

In my opinion, the order striking out the counterclaim was improper, unless it can be said that the cause of action in the counterclaim is not “relating to or connected with the original subject of the cause or matter.”\* While it might be contended that the misappropriation of other moneys by the plaintiff and the Drakes is not connected with the note transaction, it can hardly be contended that the taking of the very moneys for which the notes were given is not so. It would be for the trial Judge to decide how far an inquiry might go in respect of such other matters and moneys, but at this stage the counterclaim as a whole could not go by the board. It may be considered that the order was made in reality because it was not convenient to try the issues at the same time. I do not agree that it was not convenient; but think it was most convenient that they should be then tried.

D. C.  
1910  
THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.  
Riddell, J.

\* Ontario Judicature Act, sec. 57 (7).

D. C.

1910

THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.  
Riddell, J.

But, if so, the least that should, I think, have been done, I shall now mention.

For, even if the order could be supported, it would still be proper to stay the execution of the judgment against the company until the dealings of the plaintiff with the property of the company were investigated: *Auerbach v. Hamilton* (1909), 19 O.L.R. 570 (C.A.). And that relief should be given the company now.

Then, as to the main appeal, the first contention is, that the notes are not signed in the name of the company. This, with some other objections, was raised in *Farmers Bank v. Big Cities Realty and Agency Co.*, 15 O.W.R. 241, 1 O.W.N. 397, and there overruled. As that case was a County Court case, we are not bound by it. I have accordingly considered these objections anew, and see no reason to change the opinion previously expressed.

The notes read thus—I quote one: “Three months after date we promise to pay to the order of P. M. Thompson three hundred dollars, at our office, Toronto, with interest at 6 per cent. per annum: value received.” It is signed by a rubber stamp, “The Big Cities Realty & Agency Co. Ltd.,” and immediately below appear

(in writing)

“John Lusden,

(in stamp)

“President.

(in writing)

“Robert Rae,

(in stamp)

“Secy.-Treas.”

The Ontario statute is appealed to, 7 Edw. VII. ch. 34, sec. 27; but that statute, sec. 27 (2), specifically provides that the word “Limited” may be contracted to “Ltd.,” where, as here, the word “company” forms part of the name of the corporation. The complaint then is reduced to the use of the contraction “Co.” for the word “company.” I know of no law compelling a company to use its full name without contraction on any instrument, any more than to prevent a man whose name is Thomas writing “Tho.” or “Thos.” The cases cited are *nihil ad rem*: *Penrose v. Martyr*, E.B. & E. 499, upon the statute 19 & 20 Vict. ch. 47, sec. 31; *Atkin v. Wardle*, 61 L.T.R. 23, and *Nassau Steam Press v. Tyler*, 70 L.T.R. 376, upon the Companies Act of 1862, 25 & 26 Vict. ch. 89, deal with the personal liability of those signing a bill of exchange in a form forbidden by the statute, but have no application to the question of the liability of the company; *Boyd v.*



*Mortimer*, 30 O.R. 290, and *Alexander v. Sizer*, L.R. 4 Ex. 102, are equally aside from the point. There are many cases in which such a designation of the company has been considered sufficient; e.g., to cite two only: *Canada Paper Co. v. Gazette Publishing Co.* (1893), 32 N.B.R. 689; *Falk v. Moebis* (1888), 127 U.S. 597. See also *Fairchild v. Ferguson* (1892), 21 S.C.R. 484.

As to the argument that it is not proved that the persons who appear to have affixed the name of the company are those having power to do so, the simple answer is, that the plaintiff has nothing to do with this, having received the notes in good faith and having nothing to do with the management of the company. It cannot be contended that the making of the notes is *ultra vires* of the company. And in any case the company would be liable for the money received.

Upon the facts I see no reason to disagree with the findings of the trial Judge—and they seem to be that the plaintiff had advanced to Drake \$100, and then arranged with Drake, who was managing the defendant company, that he (the plaintiff) and the company would go into a joint speculation in land, each to advance \$1,200. Drake arranged with the company that his salary should be charged with \$100, this sum credited to the plaintiff as a payment on account of the \$1,200 to be advanced by him, and then the plaintiff gave a cheque for \$1,100 more, which, being drawn to the order of Drake, was indorsed by him and deposited to the account of the company in the company's bank. The plaintiff subsequently becoming dissatisfied, the company took over the enterprise, and gave notes for the amount signed by the proper officers of the company—the notes sued upon are renewals of those notes, a small payment having been made on account of one.

In that state of facts, there can be no doubt that the company are liable. The appeal against the judgment should be dismissed with costs.

But the proceedings on this judgment should be stayed, "the judgment to stand for the protection *quantum valeat* of the plaintiff," as was done in *Auerbach v. Hamilton*, 19 O.L.R. 570, until the counterclaim be tried, the plaintiff or defendants or any or either of them in the counterclaim to be at liberty to give short notice of trial (or, if the parties agree, without notice), and set the case down for trial without further fee.

D. C.  
1910  
THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.  
Riddell, J.

D. C.  
1910  
THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY CO.  
Riddell, J.

The plaintiff, having opposed the motion against striking out the counterclaim, should not, in any event, get costs of this motion, but, having consented to go down for trial, he should not be ordered to pay them forthwith—he should pay the costs of this motion in the cause in any event of the cause, and be allowed to have these costs set off against his judgment. The Drakes have caused the whole difficulty by their motion to strike out the counterclaim, and they have insisted on retaining the advantage which they have improperly obtained—they have insisted upon their strict rights, and cannot complain if the strict rule is applied to them. They should pay the costs of this appeal and of the motion before my brother Sutherland forthwith after taxation thereof.

BRITTON, J.:—The history of this case and the facts evolved before the trial, at the trial, and during the argument, are so clearly and with such detail set out by my brother Riddell that no useful purpose would be served by me adding a word as to these.

I entirely agree that the appeal by the defendants against the judgment in favour of the plaintiff should be dismissed with costs.

Assuming that the claim of the plaintiff is a just one, if it turns out that the counterclaim against him by the defendant company is a myth, it will be unfortunate for the plaintiff that he has been delayed and will be further delayed in the recovery of his money by the action of the third parties.

If the Drakes or the plaintiff objected to the trial of the defendants' alleged claim, as a counterclaim, in the present action, application should have been made under Con. Rule 254 long before it was made. The application was made at the trial. It was in reality part of the trial, but without all the evidence being heard.

Had the application been made within a reasonable time after the third parties were brought in, and before the trial, and a Judge in Chambers had made the order, his decision would probably not have been interfered with. Such decisions "will rarely be interfered with:" see *Holmested & Langton*, p. 456; and see *Huggons v. Tweed*, 10 Ch. D. 359.

It is an entirely different thing, when an action with third parties brought in is ripe and ready for trial, to have the counter-

claim struck out upon affidavit evidence or upon a partial trial, not on the merits, but on the question of convenience. It is then an action to be tried. I do not understand that the learned trial Judge intended to do more or did do more than strike out the counterclaim as a matter to be tried in the present action, leaving the defendant company to bring a separate action or to pursue their remedy in any way they might think proper. Upon the argument I thought, considering the position of the plaintiff, such an order ought, if possible, to be upheld, but a more careful consideration of the practice and authorities and of the facts in this case leads irresistibly to the conclusion that the order must be set aside.

I agree that the terms stated by Mr. Justice Riddell are reasonable and proper in disposing of this appeal.

FALCONBRIDGE, C.J.:—I concur.

D. C.  
1910  
THOMPSON  
v.  
BIG CITIES  
REALTY  
AND  
AGENCY Co.  
Britton, J.

[IN THE COURT OF APPEAL.]

IHDE V. STARR.

C. A.  
1910  
June 15.

*Easement—Conveyance of Lots according to Registered Plan—Park Reserve and Entrance Marked on Plan—Registry Laws—Statute of Limitations.*

*Held*, affirming the judgment of a Divisional Court, 19 O.L.R. 471, in the circumstances there stated, that what the plaintiff claimed and was entitled to was an easement, and that the defendant's possession was insufficient to bar the plaintiff.

*Mykel v. Doyle* (1880), 45 U.C.R. 65, approved and followed.

*Per* GARROW, J.A., that, even if the conveyance to the defendant had actually been of the land which she claimed to have purchased, she must have taken subject to the rights of prior and subsequent purchasers of lots laid out on the plan, such rights resting upon and being protected by the prior registration of the plan, of which every one subsequently dealing with the land was bound to take notice; and such rights were in the nature of easements.

*Per* MEREDITH, J.A., that the whole difficulty had arisen through a mistake of fact as to the actual position on the ground of the reservations, a mistake made when the defendant first acquired an interest in the land, and not attributable to the plaintiff; what the parties were bargaining about was land abutting on these reservations, with common rights over them, for access, etc.; and the common rights in the reservations—created, at least, when the defendant took her lease—being easements, against which the Statute of Limitations relied upon by the defendant does not run, no title by length of possession had been acquired.

C. A.  
1910  
IHDE  
v.  
STARR.

APPEAL by the defendant from the order of a Divisional Court, 19 O.L.R. 471, reversing the judgment of MULOCK, C.J.Ex.D., at the trial, which dismissed the action, and directing judgment to be entered in favour of the plaintiff.

The action was brought by the plaintiff, on behalf of herself and "all other the property holders at Crescent Beach, in the township of Bertie, in the county of Welland," for an injunction restraining the defendant from obstructing or interfering with in any way or preventing or hindering the plaintiff and all others the property owners at Crescent Beach in the free and uninterrupted use and enjoyment of a park private reserve and private entrance to lots for the exclusive use of occupants of lots in Crescent Beach tract, by the placing or erecting a dwelling or building or structure thereon or otherwise howsoever, and to compel the defendant "to remove said dwelling, building, or structure, and plants, shrubs, and other things, off the said park private reserve and private entrance to lots for exclusive use of occupants of lots in Crescent Beach track now thereupon, placed there by the defendant or at her instance."

February 4. The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

*W. M. Douglas*, K.C., for the defendant. The Divisional Court erred in applying the case of *Mykel v. Doyle* (1880), 45 U.C.R. 65 (on which it based its whole judgment), to the circumstances of this case, for *Mykel v. Doyle* was a decision that title to an existing way cannot be acquired by ten years' possession, whereas in the present case there was no existing way, and the land on which the defendant's house stood is not now and never has been used as a way. The defendant had a good title by possession to the mound and the portion of it occupied by her, as the same had been occupied since 1894 by her house, gardens, etc., enclosed by walls. The Statute of Limitations commenced in 1894 to run as against the association, the owners of all lots on the portion of the plan in question, and the owner of the portion of land between the blocks referred to as "Private park reserve" and "Private entrance to lots," and, as the statute began to run against the association, the subsequent purchase by the plaintiff from the association of certain lots on the plan did not stop the statute running: *Lightwood on Time Limit on Actions* (1909), pp. 56, 57; *Stackpoole v. Stackpoole*



(1843), 4 Dr. & War. 320, 347; *Doe dem. Dayman v. Moore* (1846), 9 Q.B. 555; *Doe dem. Curzon v. Edmonds* (1840), 6 M. & W. 295. The portions of land marked "Private entrance" were never dedicated to the public, and the portion of land between blocks D and E now claimed by the plaintiff as a right of way was not used as a right of way up to 1894, nor at any time since, prior to the commencement of this action. There could not in fact be any right of way over that portion of the land, because there was unity of ownership in the association. The association was the absolute owner of the alleged right of way and the absolute owner of all lots abutting upon either side thereof. Therefore, the association could have no right of way over its own land: Gale on Easements, 8th ed., pp. 18, 156, 180, 516; *Harris v. Smith* (1876), 40 U.C.R. 33, 61. There is no right in gross to the ways laid out on a plan; it is a question of individual right in each case: *Bell v. Golding* (1896), 23 A.R. 485; *Carey v. City of Toronto* (1885-6), 11 A.R. 416, 14 S.C.R. 172. As the association was the owner of all land, and as the defendant occupied a portion thereof in the year 1894, to the exclusion of the association, the Statute of Limitations commenced to run.

*E. D. Armour*, K.C., and *G. H. Pettit*, for the plaintiff. Before the defendant took her lease of certain lots, sales had been made according to the plan, and rights of way over the private ways, so laid out, had been acquired, and in any event the ways are shewn as appurtenant to the building lots, and rights of way would pass as easements for the conveyances of the lots. The way was appurtenant to the lots, and the placing of the house upon the way and the failure to remove the roads and fences was a breach or disobedience of the judgment in the former action. The Statute of Limitations is not applicable in the case of a way over which the plaintiff had a right to travel. In any event, the judgment in the former action put an end to any claim under the Statute of Limitations. Whatever right the owner had against the owner of the fee is and was an equitable right only, and void as against the plaintiff, who had no notice thereof when she bought the lots in block D. There were established rights of way existing at the time of the demise to the defendant, and so the defendant's possession for ten years is not sufficient to bar the plaintiff's right to the easements claimed by the latter: *Mykel v. Doyle*, *supra*. Under the settle-

C. A.  
1910  
IHDE  
v.  
STARR.

C. A.  
1910  

---

IHDE  
v.  
STARR.

ment in the former action the defendant practically acknowledged the plaintiff's right to the way. The effect was to convey the plaintiff's land to her with the right of way. This put an end to the Statute of Limitations, if it ever existed, as against the land and appurtenances, of which latter the right of way was one. Cessation of enjoyment does not extinguish an easement. There was no abandonment here: *Mykel v. Doyle, supra*; *McKay v. Bruce* (1891), 20 O.R. 709, 717.

*Douglas*, in reply. The settlement of the former action gives the plaintiff the lands in the pleadings mentioned, but the way was not in question in the action.

June 15. GARROW, J.A.:—Appeal by the defendant from the judgment of a Divisional Court reversing the judgment at the trial of Mulock, C.J., who dismissed the action.

The action was brought by the plaintiff, suing on behalf of herself and all others the property holders at Crescent Beach in the township of Bertie, in the county of Welland, to restrain the defendant from obstructing an alleged right of way, and for damages.

The facts are very fully stated in the judgments of Mulock, C.J., and of Meredith, C.J., who delivered the judgment of the Divisional Court.

It is clear, I think, as was practically held in the Courts below, that the case must turn on the question whether the defendant has acquired a title under the Statute of Limitations. Chief Justice Mulock held that the defence was made out, while Chief Justice Meredith was of the opinion that, as what the plaintiff claimed and was entitled to was an easement, the defendant's possession was insufficient to bar the plaintiff; and, much as I regret the hardness of the defendant's case, I feel compelled to concur with that view.

Both titles, that is the plaintiff's and the defendant's, are registered. The plan under which it must be held that both claim was registered before either title began.

The parcels mentioned in the defendant's ninety-nine-year lease are set out in the plan, and the parcels owned by the plaintiff are also described in it. And upon it also are plainly set forth the open spaces called "Private entrance" and "Park," upon both of which, it is not disputed, the defendant's buildings and improvements encroach. The defendant's occupation began in May, 1895, or

perhaps a little earlier, for the house was apparently built in the previous winter, although not occupied until May, 1895. The plaintiff purchased the parcels which she first owned (lots 111, 112, 113, and 114) in September, 1902. They had previously been the property of Mary C. Selleck and F. Selleck, who purchased from the association by deed dated the 26th October, 1899.

While the lots were all unsold, there was nothing to prevent the original vendors, the Beach Association, from enclosing and using the land as it had been used before the plan was registered. There was no one then to complain. See *In re Morton and City of St. Thomas* (1881), 6 A.R. 323. But this right would cease upon a sale being made under the plan. See *Sklitzsky v. Cranston* (1892), 22 O.R. 590. The title to the soil of the way remained in the owner, who might sell and convey his interest in it. But such sale would necessarily be subject, not merely to the then existing rights in the way, if any, but also to similar future rights arising upon subsequent sales. So that, even if the conveyance to the defendant had actually been of the land which she claims she purchased—and her case can be put no higher than that—she must, even in that event, have taken subject to the rights of prior and subsequent purchasers of lots laid out on the plan, such rights resting upon and being protected by the prior registration of the plan, of which every one subsequently dealing with the land was bound to take notice.

And that such rights were in the nature of easements I cannot doubt, notwithstanding the able argument of Mr. Douglas. The case, in my opinion, clearly falls within the authority of *Mykel v. Doyle*, 45 U.C.R. 65, which has been too long followed to be now questioned in any Court in Ontario.

The appeal must, in my opinion, be dismissed with costs.

MEREDITH, J.A.:—This is one of those cases in which, unfortunately, however decided, one of the parties must be put to a very considerable loss, without any right of compensation from the other—however it may be as to persons who are not parties to this action.

The whole difficulty has arisen through a mistake of fact made when the defendant first acquired an interest in the land in question. According to the evidence adduced in this case, whatever the fact may really be, to the defendant's lessors or grantors that mistake

C.A.  
1910  
IHDE  
v.  
STARR.  
Garrow, J.A.

C.A.

1910

IHDE

v.

STARR.

Meredith, J.A.

is mainly attributable; but, however that may be, it is certainly not attributable in any sense to the plaintiff.

The defendant desired to acquire that piece of land which has been called the mound; the persons from whom she sought to acquire it thought that it was part of lots 128 and 129, in the registered plan of the survey of the whole locality. The plaintiff and her husband both knew that there were reservations of a "Park" and "Private entrance" for the use of the owners of the lots in this part of the survey; the whole difficulty arose from a mistake as to the actual position, on the ground, of the reservations; they were supposed, by lessors and lessees, to be to the east of the mound, when in truth the mound was in the centre of them.

The defendant herself makes this quite plain in these short extracts from her evidence at the trial:—

"Q. Your sole and only object was, to buy that sand dune?

A. We wanted that particularly to put the house on, and Mr. Hill told us that we could buy that, that the lots extended over to another line, that that was the tract of land we were purchasing.

"Q. I understood you to say that you understood there was a park? A. Mr. Hill told us there was a park in front, and that no one could come any nearer to us than they were then, that there was a park between Mr. Selleck and ourselves."

And her husband in these:—

"Q. When you bought that property, didn't you know there was a private entrance, a park entrance or right of way to the lake, somewhere along there? A. I did not know; I understood that these lots were divided up into blocks, that between the blocks there were spaces, which in a general way were called the parks, and private entrances, by which people might get from the rear to the lake.

"Q. That was the object? A. I understood in a general way that there was a division between the blocks.

"Q. That these divisions were for the owners abutting on those divisions to get down to the lake in the rear? A. Nothing was said; I had some idea, of course.

"Q. You had some idea of it? A. I had an idea that the association laid out those park ways for the purpose of beautifying it some time, having, as they called it, parks.

"Q. Did you think the park extended from the lake to the rear of the blocks? A. Yes.



"Q. And what did you think the park was for? A. I was told, as I say, by some member of the association, that their idea was to have the parks there.

"Q. But you knew the lots on each side of those blocks abutting on the park? A. Yes.

"Q. Did you, or did you not? A. I probably did, yes.

"Q. And you knew or suspected that that park was for the purpose of lots, or the owners of lots, to get in or out? A. That they had a right to go through them.

"Q. Either down to the lake or up to the rear? A. Yes.

"Q. And you knew there was such a park right where it is now? A. No, I did not.

"Q. Right where your house is? A. Yes.

"Q. Somewhere right there? A. The president of the association—

"Q. Never mind him. A. That is where I got my information.

"Q. But never mind your information. A. I simply asked him, and he said it was not there.

"Q. Did you have an idea that it was close by? A. I supposed that a so-called right of way was about eighty feet farther east than this map shews it on.

"Q. You knew there was a park entrance near where you were buying? A. Yes."

Without this testimony, that fact would have been sufficiently plain. Apart from the improbability of a sale which would destroy the survey and plan of this block of land and render the lots in it unsaleable, the defendant would have been acquiring a piece of land which, by sales of other portions of the reservations, might be deprived of all means of access, except by a way of necessity, if at all, and which might, by surrounding buildings, have been deprived largely, if not entirely, of the very advantages the defendant was seeking in her endeavour to acquire that particular spot.

It therefore seems to me to be abundantly plain that what these parties were bargaining about was land abutting upon these reservations, with common rights over them, for access, etc.

In view of these facts, as well as of all the other material circumstances of the case, it seems to me that, from whatever point of view the case is looked at, the judgment of the Divisional Court was, in its effect, right, and that the unavoidable hardship must fall upon the defendant.

C. A.

1910

HIDE

v.

STARR.

Meredith, J.A.

C. A.

1910

IHDE

v.

STARR.

Meredith, J. A.

If the relationship of landlord and tenant were created by the lease under which the defendant first acquired her interest in the land, and if that relationship continued up to the time when Selleck obtained her deed, no title by length of possession can have been acquired by the defendant; she could not acquire title against her landlords, and their deed to Selleck would be entitled to priority unless a lease of it was duly registered, or Selleck had actual notice of it or of some equitable right in the defendant to the mound. That, notwithstanding the mistake, that relationship, if created at all, would exist as to the land actually occupied, I cannot doubt.

The lease, though registered, was registered against lots 128 and 129 only; the land which the mound actually covered was not described in it; it was never intended to be; and there is certainly no evidence of actual knowledge on the part of Selleck of any interest, legal or equitable, in the defendant, in any part of the reservations. Indeed, how can the defendant be said to have had any such right? Could she, upon her own evidence, have compelled her lessors to convey to her any part of the reservations? At all events, if she had, she herself was unaware of the fact, supposing that they lay between the mound and Selleck's lots, as she distinctly says in the extract from her evidence which I have quoted. Selleck could hardly have had actual notice of rights of which, if any, the defendant herself was ignorant.

The registration laws, therefore, gave to Selleck, under her registered deed, priority over the defendant's lease in regard to any interests in the reservations. Selleck's purchase, and deed, being according to the survey and plan, she, of course, took an interest in the reservations.

But, if the transaction evidenced by the "lease" is to be looked upon as a purchase, what then? It was not a purchase of any part of the reservations; it was not intended to be. The deed was a transfer of the two lots in the survey, carrying with it common rights in the reservations. And, even if there were any doubt upon this question, how could the defendant get the benefit of the transaction, as a sale of part of the reservations, behind the backs of her lessors? And, if she could, would that cut out the plaintiff's registered title, acquired from the registered owners, without any actual notice of the defendant's equitable rights?

The owners of the land having by the survey and registered plan

made these reservations, and by the sale of a lot having prevented themselves from altering the plan of their own accord, is there any reason why they might not, as owners of other lots in the survey, have common rights in respect of these reservations as well as their interest in the land which was subject to such easements? And, if the statute invoked does not apply to an easement, can it take away the right to an easement lawfully acquired in lands in respect of which the statute had commenced to run in other respects? Can it be said that the statute continued to run against an easement, which is not within its provisions? But, however that may be, if not before that time, by the sale and conveyance to the defendant of lots 128 and 129, she and the owners of the other lots in the survey became entitled to this easement, and so the statute never commenced to run as to it in her favour.

The common rights in the reservations—created, at least, when the defendant took her lease—being, then, easements, against which it has long been held that the statute upon which the defendant relies does not run, no title by length of possession has been acquired.

It is quite too late a day to seek to disturb, in any Court, the law, in this respect, so long ago laid down, and never since departed from, and the many rights, titles, and interests which must be dependent upon it.

I would dismiss the appeal.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

C. A.

1910

INDEX

v.

STARR.

Meredith, J.A.

## [IN THE COURT OF APPEAL.]

1910

ALLEN V. CANADIAN PACIFIC R.W. Co.

June 15.

*Railway—Carriage of Goods—Destruction—Liability—Tort—"Active" Negligence—Contracts between Express Company and Shipper and between Express Company and Railway Company—Absence of Privity—Exemption—Indemnity—"Intrusted or Delivered for Transportation"—Application for Benefit of Railway Company.*

The plaintiff delivered to the Dominion Express Company at Toronto a trunk of valuable samples to be carried to Quebec. The company gave him a receipt therefor, whereby, as he failed to place a value on the articles in the trunk, their value was fixed, as between him and the company, at \$50. The company was an independent company, operating upon the lines of railway of the defendants in Canada, under a general agreement with the defendants, by one clause of which the express company assumed all responsibility for and agreed to satisfy all valid claims for the loss of or damage to express matter in its charge, and to hold the defendants harmless and indemnified against such claims. The trunk was placed by the express company in a car of the defendants upon the defendants' railway, and was there, in charge of the express company's servant, when a collision occurred, as a result of which a fire took place, and the trunk and contents were destroyed. The defendants admitted that the collision was caused by the negligence of their servants:—

*Held*, that an action in tort lay against the defendants for the loss of the goods: the defendants were liable for their "active" negligence in bringing about the collision.

*Held*, also, that the defendants were not entitled, as against the plaintiff, to the exemption from liability stipulated for in their agreement with the express company, under which they received and were carrying the goods; nor to the benefit of the limitation of liability to \$50 provided for in the plaintiff's contract with the express company; for to the first agreement the plaintiff was a stranger, and to the second the defendants were in the same position; and, in addition, the exemption clauses should be construed strictly, and the exemptions claimed would not extend to include an act of collateral or "active" negligence.

*Martin v. Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9, specially referred to.

*Lake Erie and Detroit River R.W. Co. v. Sales* (1896), 26 S.C.R. 663, distinguished.

*Semble*, that, if the agreement between the plaintiff and the express company had any application, the clause "that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom through this company the below described property may be intrusted or delivered for transportation" did not apply to the defendants, but to a person or company beyond the line of the defendants' railway, to whom it might be necessary for the express company to part with the property in order that it should reach its destination.

Judgment of RIDDELL, J., 19 O.L.R. 510, affirmed.

APPEAL by the defendants from the judgment of RIDDELL, J., 19 O.L.R. 510, in favour of the plaintiff, in an action to recover the value of goods of the plaintiff delivered to the Dominion Express Company at Toronto for transmission to Quebec, and destroyed while being carried in a car of the defendants, by reason of a collision upon the defendants' railway. The car was the defen-



dants', but the contents were under the control and in the possession and under the physical oversight of a servant of the express company.

February 7. The appeal was heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

*Wallace Nesbitt*, K.C., and *Angus MacMurchy*, K.C., for the appellants. The respondent having valued his goods for the purposes of shipment at \$50, under the terms of the receipt handed to him by the Dominion Express Company, it is submitted that the appellants are entitled to the benefit of that condition, by virtue of the clause in the receipt providing that the stipulation contained therein should enure to the benefit of every company or person to whom the property should be "intrusted or delivered for transportation," and that the trial Judge erred in holding that the goods were not intrusted to the appellants within the meaning of that provision. The appellants are not common carriers with respect to express parcels, and where they receive such goods for transportation they are not liable to a greater extent than the value at which the goods were tendered. The respondent knew that the goods would be tendered to the appellants as being worth \$50, and is estopped from setting up that they are of any greater value. The main point in the case is as to the interpretation of the phrase "intrusted for transportation," as to which we rely on *Lake Erie and Detroit River R.W. Co. v. Sales* (1896), 26 S.C.R. 663. The following cases were also referred to: *Robertson v. Grand Trunk R.W. Co.* (1894), 21 A.R. 204, at pp. 208, 219; *The Winkfield*, [1902] P. 42, at p. 60, per Collins, M.R.; *St. Louis Iron Mountain and Southern R.W. Co. v. Southern Express Co.* (1885), 117 U.S. 1.

*G. F. Shepley*, K.C., and *G. W. Mason*, for the respondent. The appellants were in the position of wrong-doers, and there was no privity of contract between them and the respondent. It is admitted that the respondent's property was destroyed by the negligence of the appellants, for which no excuse is offered, and the onus lies upon them of establishing a ground upon which they can escape liability. The real point in the case is as to the alleged restriction of that liability to \$50, under the provision in the receipt which has been referred to. On this point the respondent

C. A.

1910

ALLEN

v.

CANADIAN  
PACIFIC  
R.W. Co.

C. A.  
1910  
ALLEN  
v.  
CANADIAN  
PACIFIC  
R.W. Co.

relies upon the judgment of the trial Judge, where the *Sales* case is fully discussed and shewn not to be an authority for the position contended for by the appellants. The stipulation relied on by the appellants only professes to protect carriers to whom the customer's goods are "intrusted or delivered for transportation." The goods in question were never intrusted or delivered by the express company to the appellants, but remained in the physical custody and possession of the express company in the same way as a passenger's luggage remains in his custody while he is travelling upon a railway.

*Nesbitt*, in reply, referred to *East Indian R.W. Co. v. Kalidas Mukerjee*, [1901] A.C. 396, as shewing that railway companies are not liable as common carriers as regards passengers and their belongings. The appellants were put into possession of the goods by reason of the express messenger putting them on their train, on which he remained. This case is on a very narrow point, and much of the learning contained in the judgment appealed against is inapplicable.

June 15. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendants from the judgment at the trial in favour of the plaintiff, of Riddell, J., without a jury.

The facts fully appear in the judgment, and are really not in dispute.

The plaintiff, desiring to send a trunk of valuable samples from Toronto to Quebec, sent it in the usual way to the Dominion Express Co., by one of their carters, receiving the receipt set out in the judgment of Riddell, J. The plaintiff, either through ignorance of the necessity or from oversight, failed to place a value upon the articles contained in the trunk, with the result that such value, under the terms of the receipt, was fixed, as between him and the express company, at \$50.

The express company is an independent company, operating upon the lines of railway of the defendants in Canada, under a general agreement with the defendants, admitted at the trial, containing many provisions, and, among others, one by which the express company assumes all responsibility for and agrees to satisfy all valid claims for the loss of or damage to express matter in its charge, and to hold the defendants harmless and indemnified against such claims.

The goods in question were placed by the express company in the car used for that purpose upon the defendants' railway, and there remained in charge of the express messenger, where they were when a collision occurred between the train on which they were and another train of the defendants, as a result of which a fire took place, and the goods were destroyed. The defendants admit that the collision was caused by the negligence of their servants; and for the damages thus caused this action is brought.

The cause of action is one arising, if at all, *ex delicto*, because the plaintiff had no contract with the defendants. And it is not the ordinary cause of action against a common carrier for not carrying safely, which may be in tort as well as upon the contract, because the goods were not received by the defendants in that character, but under their general agreement with the express company, which contains the exemption from liability clause to which I have referred.

That such an action will lie seems beyond question. To many of the authorities on the subject Riddell, J., has referred, and, as I agree in his conclusion, I need not here repeat what he has said. I will, however, refer to one authority, not, I think, referred to by him, which has at least the merit of possessing some features in common with this rather unusual and somewhat puzzling case, namely, *Martin v. Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9. In that case the facts were that the plaintiff, an officer in Her Majesty's service in India, was a passenger on the defendants' railway, under a contract for carriage not made by him, but by the Government, one of the terms of which was that the baggage, including the plaintiff's, should remain in charge of a guard provided by the troops, the company accepting no responsibility. The plaintiff's baggage was burnt and destroyed through the negligence of the defendants' servants, and the plaintiff was held entitled to recover. Kelly, C.B., at p. 12, says all the Judges were of the opinion that the limitation of responsibility would have covered any loss of baggage in the custody of the guard, occurring through the want of care on the part of the officer in charge, or those under him, but would not extend to the case of mere negligence on the part of the company.

So here, if the loss had occurred through any negligence on the part of the express company or their servants, the defendants

C. A.  
1910  
ALLEN  
v.  
CANADIAN  
PACIFIC  
R.W. Co.  
Garrow, J. A.

C. A.  
1910  
ALLEN  
v.  
CANADIAN  
PACIFIC  
R.W. Co.  
Garrow, J.A.

would not have been liable. What they are, in my opinion, liable for, is their own separate, or, as it is in some of the cases called, "active," negligence in bringing about the collision. See *per A. L. Smith, L.J.*, in *Taylor v. Manchester Sheffield and Lincolnshire R.W. Co.*, [1895] 1 Q.B. 134, at p. 140, and by the same learned Judge in *Meux v. Great Eastern R.W. Co.*, [1895] 2 Q.B. 387, at p. 394.

The only real defence to the plaintiff's claim is made upon two grounds: (1) that the defendants are entitled, as against the plaintiff, to the exemption from liability stipulated for in their agreement with the express company, under which they received and were carrying the goods; and (2) that, in any event, they are entitled to the benefit of the limitation of liability to \$50 provided for in the plaintiff's contract with the express company, which amount they paid into Court without admitting liability.

There is, however, in my opinion, this fatal objection to the success of both defences, that to the first agreement the plaintiff is a stranger, and to the second the defendants are in the same position.

And, in addition, as to both, if the reasoning in the case before referred to of *Martin v. Great Indian Peninsular R.W. Co.* is sound, as, in my opinion, it is, the exemptions claimed would not extend to include an act of collateral or "active" negligence, to use again that expressive term, such as the collision.

Such indemnity or exemption clauses are, quite properly, construed strictly, and, if intended to exclude claims for negligence, that should be clearly expressed: see *Price v. Union Lighterage Co.* (1904), 20 Times L.R. 177.

This case is, I think, easily distinguished from that of *Lake Erie and Detroit River R.W. Co. v. Sales*, 26 S.C.R. 663, upon which the defendants relied in the argument before us. There the plaintiff was proceeding upon contracts with the defendants which were undoubtedly binding upon him, whether his declaration was upon the contract or for the tort. And it was to this circumstance that Gwynne, J., in delivering the judgment of the Supreme Court, referred, at p. 677, when speaking of that phase of the cause of action which it was alleged arose *ex delicto*. In other words, the plaintiff there had no cause of action *ex delicto* at all, because he had, as the documents shewed, agreed in ad-



vance to exempt the defendants from responsibility for the very thing which actually happened, while to so hold here would be to beg the question in issue.

But, if the agreement between the plaintiff and the express company has any application, I agree with the construction placed by Riddell, J., upon the obscurely expressed clause relied on, "that the stipulation contained herein shall extend to and inure to the benefit of each and every company or person to whom through this company the below described property may be intrusted or delivered for transportation," namely, that it was not intended to apply and does not apply to the defendants, but to a company or person beyond the line of the defendants' railway, over the whole of whose lines in Canada the express company operates, to which company or person it might be necessary for the express company to part with the property in order that it might reach its destination.

For these reasons, I think the appeal should be dismissed with costs.

---

[IN THE COURT OF APPEAL.]

JONES V. TORONTO AND YORK RADIAL R.W. Co.

*Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Evidence for Jury—New Trial.*

In an action for damages for injuries sustained by the plaintiff, owing, as he alleged, to the negligence of the defendants, whereby he was struck by a car operated by their servants, while crossing a highway on foot:—

*Held*, that there was, at the close of the plaintiff's case, some evidence proper to be passed upon by the jury both of negligence on the part of the defendants and of contributory negligence on the part of the plaintiff; and that a nonsuit was properly set aside and a new trial directed.

Judgment of a Divisional Court, 20 O.L.R. 71, affirmed.

*Per* GARROW, J.A., that it is the well-established rule that, where reasonable evidence is given of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff, these issues must be determined by the jury. The cases which at first sight seem to qualify this rule are cases in which the Court was able to reach the conclusion that the negligence of the plaintiff was the sole cause, or that the conduct of the plaintiff was *per se* negligent, or the evidence so clear and undisputed that only the one inference could be reasonably possible.

APPEAL by the defendants from the order of a Divisional Court, 20 O.L.R. 71, reversing the judgment of MACMAHON, J., at the trial, and directing a new trial.

C. A.  
1910  
—  
ALLEN  
v.  
CANADIAN  
PACIFIC  
R.W. Co.  
—  
Garrow, J.A.

C. A.  
1910  
—  
June 15.

C. A.  
1910  
JONES  
v.  
TORONTO  
AND  
YORK  
RADIAL  
R.W. Co.

The action was brought for damages for injuries sustained by the plaintiff, owing, as he alleged, to the negligence of the defendants, whereby he was struck by a car operated by their servants, while crossing Yonge street, south of Eglinton avenue.

April 26. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*C. A. Moss*, for the defendants. The accident occurred in broad daylight; the plaintiff saw one of the defendants' cars standing on a siding to the north; the plaintiff descended from his waggōn, intending to cross the track, and did not again look to see whether or not any car of the defendants was approaching from the north. He assumed that the car which he had seen to the north was waiting for the purpose of allowing a car from the south to pass it at the siding, but he did not see any car coming from the south. Upon this evidence there was nothing to submit to a jury. Cases in which there was an excuse for a person not looking do not apply to this state of facts. He cited *Fewings v. Grand Trunk R.W. Co.* (1909), 14 O.W.R. 586, 1 O.W.N. 1.

*John MacGregor*, for the plaintiff. The defendants were negligent in running the cars at an excessive speed, in not sounding the gong, and in not giving any warning to the plaintiff of the approach of the car, and in not stopping or slackening the speed of the car when it became apparent that the plaintiff did not perceive the approach of the car: *Haight v. Hamilton Street R.W. Co.* (1898), 29 O.R. 279, at p. 281; *Toronto R.W. Co. v. Gosnell* (1895), 24 S.C.R. 582, at pp. 583, 587. There was no contributory negligence on the part of the plaintiff. The questions of negligence and contributory negligence are questions for the jury, and should have been submitted to the jury: *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155, at p. 1181; *Ewing v. Toronto R.W. Co.* (1894), 24 O.R. 694. At one time it was said that the onus was on the pedestrian to look, but this doctrine has been changed by a line of cases running through *Forwood v. City of Toronto* (1892), 22 O.R. 351; *Ewing v. Toronto R.W. Co.*, *supra*; *Toronto R.W. Co. v. Gosnell*, *supra*; and *Tinsley v. Toronto R.W. Co.* (1908), 17 O.L.R. 74. The plaintiff does not now need to prove negligence affirmatively. The doctrine of *res ipsa loquitur* applies, and, once the unusual event is proved, the

onus is shifted: Thompson's Commentaries on the Law of Negligence, ed. of 1901, vol. 2, sec. 1384; *Gilmore v. Federal Street and Pleasant Valley Passenger R. Co.* (1892), 153 Pa. St. 31; *Gildea v. Metropolitan Street R. Co.* (1901), 58 N.Y. App. Div. 528, 529.

Moss, in reply, said that the doctrine of *res ipsa loquitur* did not apply. He further submitted that the plaintiff could not go beyond his own negligence, but that, if he could, he must prove that the motorman knew that the plaintiff was intending to cross the track.

June 15. GARROW, J.A.:—The action was brought to recover damages alleged to have been caused to the plaintiff while crossing Yonge street by the negligent operation of a car upon the defendants' railway.

The plaintiff, aged fifty-six years, is a market gardener. On the 20th October, 1908, he was upon Yonge street with his horse and waggon, engaged in his calling, and, leaving the waggon on the east side of the street, he proceeded to cross over to the west side, a distance of about thirty-five feet, to call at the house of Mr. Roberts. To reach Mr. Roberts's house it was necessary to cross the line of the defendants' railway, which is laid along the west side of the street, and the plaintiff had reached and was upon the track when he was struck by a south-bound car and injured. The direction in which the plaintiff was proceeding after leaving his waggon was south-westerly, but not enough to have prevented him from looking to the north without turning. He, however, did not look to the north, although he did to the south, and for the failure to look in both directions MacMahon, J., held that he was the author of his own injury, and was not entitled to recover.

The plaintiff's reasons, such as they are, for not looking to the north, as well as to the south, were, that he was familiar with the railway and with the usual mode of operation. Some five hundred feet to the north of where he left his waggon he had, at that time, seen the car which afterwards struck him standing at a switch or turn-out, where it was customary for a south-bound car to stand and allow the north-bound car to pass, and he inferred that that was to be the case on the occasion in question; and therefore concentrated his attention upon the south, from which direction he expected a car would speedily come.

C. A.  
1910  
JONES  
v.  
TORONTO  
AND  
YORK  
RADIAL  
R.W. Co.

C. A.  
1910  
JONES  
v.  
TORONTO  
AND  
YORK  
RADIAL  
R.W. Co.  
Garrow, J.A.

The plaintiff is deaf. Some passengers on the car which struck him, fearing he was going to cross the track without observing the car which was coming, called out to him, but he did not hear. And, if passengers could see him, it is not an unreasonable inference that the motorman, if at his post, could also have seen him; but whether he did or not does not, except in that inferential manner, appear. According to the evidence, the car was going at a high rate of speed—one witness says at eighteen miles an hour. No gong was sounded, nor other warning given, nor was the speed slackened, so far as appears, as the car approached towards the plaintiff.

Under these circumstances, the Divisional Court regarded the judgment of nonsuit as erroneous, and directed a new trial, a conclusion in which I entirely agree. And, as there is to be a new trial, I refrain from entering into a general discussion of the evidence further than to say that there was, in my opinion, at the close of the plaintiff's case, in the circumstances which I have mentioned, some evidence proper to be passed upon by the jury both of negligence on the part of the defendants and of contributory negligence on the part of the plaintiff. This, however, it is needless to say, is not at all equivalent to saying, or in any way indicating, that, in my opinion, the plaintiff is entitled ultimately to succeed. What he is entitled to is, to have his action tried according to law. And, as I understand it, it is the well-established rule that, where reasonable evidence is given of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff, these issues must be determined by the jury. That is the general rule, and it will, I think, be found that most, if not all, of the cases which at first sight seem to qualify it are cases in which the Court was able to reach the conclusion that the negligence of the plaintiff was the sole and not merely a contributing cause (see the example given by Lord Cairns at p. 1166 of *Dublin Wicklow and Wexford R.W. Co. v. Slattery*, 3 App. Cas. 1155), or that the conduct of the plaintiff was *per se* negligent, or the evidence so clear and undisputed that only the one inference could be reasonably possible, which could not, I think, be said in this case.

For these reasons, I think the appeal should be dismissed with costs.



MEREDITH, J.A.:—My views of this case accord with those of the trial Judge upon the question of the plaintiff's negligence: his testimony establishes a plain case of negligence on his part; negligence which necessarily contributed to, if it did not really cause, the accident. Knowing, or supposing, that a car was standing in a siding for the purpose of permitting another car to pass it, he proceeded, on foot, to cross the tracks without ever even casting his eye to the north to see whether anything was coming in that direction, and stepped upon the track and was struck by a car which he could not but have seen, and avoided, if he had adopted even the simplest and plainest of precautions. It hardly required even a turn of the head to make sure that the other of the only two sources of known danger was safe; and that at any time after he had made up his mind to cross the street until he stepped upon the track.

The only ground upon which the plaintiff could recover would be that, notwithstanding his negligence, the defendants should, exceeding ordinary caution, have avoided his injury. It is said that they should (1) have sounded the gong and (2) have stopped or reduced the speed of the car. All that depends upon the question whether there was any reason why the driver should have thought that the man did not see the coming car, or would walk into danger without looking. To sound the gong for every one approaching the track would mean, in many places, a continuous sounding, impairing its usefulness as a warning, and creating a nuisance of noise. To say that the driver should apply the brakes for every one approaching the track would be to say that rapid transit must cease.

But there was, I think, some evidence, adduced by the plaintiff, which called for an answer by the defendants, in whose servant all the knowledge of what the driver saw, and why he abstained from sounding the gong or applying the brakes, was, if in truth he did not. The cries of the by-standers indicate that for some little time, however short it may have been, it was apparent that the plaintiff was obviously going into the great danger.

In my opinion, the order allowing a new trial ought to stand.

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., concurred.

C. A.  
1910  
JONES  
v.  
TORONTO  
AND  
YORK  
RADIAL  
R.W. Co.  
Meredith, J.A.

## [IN THE COURT OF APPEAL.]

1909

STRATFORD FUEL ICE CARTAGE AND CONSTRUCTION CO. v. MOONEY.

July 20.

C. A.

1910

June 15.

*Company—Promoters—Sale of Businesses—Secret Profits—Liability to Account—Intention to Sell Shares to Public—President and Manager of Company Interested as Vendors—Directors not Independent—Absence of Knowledge.*

The plaintiff company was promoted and incorporated at the instance of and mainly through the intervention and exertions of the defendants M. and F. B. D., with the object of acquiring and taking over the business and property of two trading concerns, in both of which these two defendants were interested as shareholders or owners. These defendants were also directors and president and manager respectively of the plaintiff company. Shortly after the incorporation of the plaintiff company, the defendant F. B. D. made an offer to the company to sell the assets and goodwill of the two concerns for \$65,000 in cash and the assumption by the company of liabilities amounting to \$14,600. This offer was accepted by a by-law passed by the directors of the company, and both businesses were taken over. The cash payment of \$65,000 was to be made with moneys derived from sales of shares in the plaintiff company, which were then being offered to the public. Moneys were not procurable in this way, as it turned out; and a promissory note for \$65,000 was signed in the name of the plaintiff company by the defendant F. B. D. as managing director, indorsed by the defendants M., F. B. D., and G. R. D., and two of the other directors of the company, and discounted by a bank, through its local manager, the defendant C. The proceeds of the note were transferred to the credit of the company in the bank, and, by cheques of the company, signed by F. B. D. as manager, at least \$25,947.76, representing the profit of F. B. D. upon the sale of the two concerns, was divided among the four defendants:—

*Held*, that the agreement for the sale was not made on behalf of the company by an independent board of directors, to whom full disclosure had been made, and who were fully aware of the interests of the defendants M. and F. B. D. in the transaction. Upon the evidence, the affair was really arranged between the defendant F. B. D., the vendor, and at the same time the real manager of the plaintiff company, and the defendant M., the president of the plaintiff company, and at the same time interested in the selling concerns. It was not intended that the company should be one in which the shares are allotted to the owner of the business concerns taken over, in consideration of the transfer of the property and business; from the beginning the intention was that ready money or its equivalent should be paid for the properties and businesses to be acquired, and that the necessary cash should be obtained by the sale of shares to the public.

*Salomon v. Salomon*, [1897] A.C. 22, distinguished.

*Held*, therefore, that the defendants were accountable to the company for the sum divided among them as profits, each to the extent to which he shared therein.

Judgment of MACMAHON, J., reversed.

THIS was an action brought by the above-named company (in liquidation) and John Brown, the liquidator, under the authority of an order made in the liquidation proceedings, to recover from the defendants, William James Mooney, Frederick B. Deacon, George R. Deacon, and A. M. Campbell, the sum of \$27,691.76, being moneys for which, as the plaintiffs alleged, the defendants were

accountable to the plaintiff company. This sum represented part of the price (\$79,600) agreed to be paid and actually paid by the plaintiff company, in cash and debts assumed and paid, for the acquisition of the business and property of the Deacon Company Limited, an incorporated company, and the business and property of another concern carried on under the name of the Stratford Cement Block Company.

June 15 and 16, 1909. The action was tried before MACMAHON, J., without a jury, at Stratford.

*G. C. Gibbons*, K.C., and *R. T. Harding*, for the plaintiffs.

*Wallace Nesbitt*, K.C., for the defendant Mooney.

*F. H. Thompson*, K.C., for the defendant Frederick B. Deacon.

*G. G. McPherson*, K.C., for the defendant George R. Deacon.

July 20, 1909. MACMAHON, J.:—The defendant A. M. Campbell, who was the manager of the Merchants Bank in Stratford, died after the time for pleading had expired, and the pleadings were noted against him.

The defendant William James Mooney is a wholesale biscuit manufacturer in Stratford. The defendant Frederick B. Deacon was the holder of a majority of the shares of the capital stock of the Deacon Company Limited, which had been incorporated, under the Ontario Companies Act, to deal in coal, wood, and ice. The defendants George R. Deacon and William James Mooney each held five shares of the stock of the value of \$100 per share. The defendant Frederick B. Deacon carried on the Stratford Cement Block Company as a separate concern.

The defendant Mooney was called as a witness by the plaintiffs, and said that he received a statement from the defendant Frederick B. Deacon as to the profits earned by the Deacon Company (the coal, wood, and ice company), and, being a stockholder in the company, he knew about what the earnings were. And the defendant F. B. Deacon gave him to understand that profits were made by the Stratford Cement Block Company.

It is alleged in paragraph 7 of the statement of claim that "the defendant Mooney was interested with the defendants the Deacons in the options acquired by them upon the stock of the said Deacon Company, and was also interested in the Stratford Cement Block Company, but, for the purpose of more effectively enabling the said scheme to be carried into effect, cancelled his interest therein."

1909  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.

MacMahon, J.

1909

STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.

In support of the allegation made in the above paragraph, an agreement was put in, which reads:—

“We, the undersigned, hereby agree to enter into partnership in a business to be known as ‘The Stratford Cement Block Company,’ and we further agree to become equally liable for all debts contracted by the said company, and also to share equally in all profits made by said company, and to participate equally in all contracts, purchase of lands, building of houses, and other business investments, entered into on behalf of said company.”

This was dated the 23rd November, 1904, and signed by F. B. Deacon, G. R. Deacon, A. M. Campbell, and W. J. Mooney.

Both the defendants Mooney and George R. Deacon said that when the document was signed a partnership was contemplated, but it was never acted upon and never registered.

The Stratford Cement Block Company had been a partnership business, in which the defendant F. B. Deacon and Dr. Monteith had been the only partners; and in the examination for discovery of the defendant F. B. Deacon, read at the trial, he said that himself, Mooney, Campbell, and his brother George R. Deacon, had decided to form a partnership in the cement business to build houses, etc., and, after the formation of this partnership was discussed, he bought Dr. Monteith's interest, for which he paid \$1,000, before the agreement of the 23rd November, 1904, was signed. He further said that the partnership was only a temporary affair, but he would not swear that the partnership thus formed was not acted upon. There were several meetings at which himself, Campbell, and Mooney were present and discussed the company's affairs. He (F. B. Deacon) was asked this question: “You swore in a former examination that Mooney and you assumed the partnership and that your brother and Mr. Campbell dropped out?” A.: “I am speaking entirely from memory at this time, and am not at all clear.”

I find that a partnership was formed between Frederick B. Deacon, Mooney, George R. Deacon, and A. M. Campbell, for the purpose of carrying on the cement block business, but the evidence does not enable me to find what length of time that partnership continued, and it may have been, as Frederick B. Deacon said, when his recollection of the facts was clearer than it was when examined for discovery, that George R. Deacon and Mr. Campbell



dropped out of the partnership, and it was subsequently carried on by Frederick B. Deacon and Mooney.

Mooney suggested to Frederick B. Deacon the formation of a new company to take over the interests of the Deacon Company Limited and the Stratford Cement Block Company; and it was understood that Frederick B. Deacon should obtain options on the stock of the Deacon Company, and the options were obtained by him from all the stockholders except five. Mooney and George B. Deacon became joint makers or indorsers on Frederick B. Deacon's notes to enable this to be carried out.

The Stratford Fuel Ice Cartage and Construction Company was incorporated on the 5th June, 1905, with an authorised capital of \$100,000, divided into 1,000 shares of \$100 each. William James Mooney, Charles Edward Nasmyth, Sydney John Cook, John Joseph Coughlin, and Malcolm Lachlin Leitch, were the provisional directors, and each is stated in the application for the charter to have subscribed for \$1,000 of stock in the proposed company.

On the 27th June, 1905, Frederick B. Deacon gave an option under seal to the Stratford Fuel Ice Cartage and Construction Company, wherein it is recited that he is the holder of the majority of the stock of the Deacon Company Limited, a company incorporated under the Ontario Companies Act; and that he carries on business in cement and as a manufacturer of cement blocks. He gave the plaintiff company an option to purchase, for the sum of \$40,000 and the assumption by the purchasers of all liabilities of the said company, amounting to \$14,600, the goodwill of the business of the Deacon Company, together with the real estate, plant, machinery, office furniture, leases, licenses, horses, waggons, etc., of the said Deacon Company in connection with the said business, also the book and other debts due to said Deacon Company, amounting to about \$5,000, and the benefit of the securities for said debts and the full benefit of all pending contracts, etc., and also all cash in hand or in bank and all bills and notes of the Deacon Company in connection with the said business. Secondly, an option to purchase the goodwill of the business of the Stratford Cement Block Company, together with the real estate held by the vendor in connection with the said business, and also all plant, machinery, patents, stock in trade, implements, etc., in connection with said business and the benefit of all pending contracts; the consideration therefor to be the sum of \$25,000.

MacMahon, J.

1909

STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.

MacMahon, J.

1909

STRATFORD

FUEL

ICE

CARTAGE

AND

CONSTRUCTION Co.

v.

MOONEY.

A statement was put in by the plaintiffs (exhibit 15) shewing in detail the value of the real and personal property of the Stratford Cement Block Company to be \$9,950, and the contracts the company had on hand to be \$6,995. And the value of the property, real and personal, belonging to the Deacon Company Limited totals \$39,971. Included therein is the sum of \$8,550, as representing the value of the franchise of the company.

The option to purchase was accepted by a by-law of the board of the plaintiff company, passed on the 4th July, 1905.

The transaction would stand in this way:—

Price of stock, goodwill, etc., of Deacon Company...	\$40,000
Liabilities assumed by new company.....	14,600
Price of cement company's business .....	25,000

---

\$79,600

To make the cash payment of \$65,000, a note for that amount was given on the 6th September, 1905, by the plaintiff company, indorsed by Mooney, F. B. Deacon, George R. Deacon, M. L. Leitch, and J. J. Coughlin. Mooney said he arranged with the defendant A. M. Campbell, the manager of the Merchants Bank, to discount the note.

On the evening of the day the note was discounted, Frederick B. Deacon, Mooney, George R. Deacon, and Campbell, met at the office of the latter, in the Merchants Bank, and Campbell had prepared three cheques each for \$4,922.94, and one for \$5,922.94, signed by the Stratford Fuel Ice Cartage and Construction Company, *per* F. B. Deacon, manager. Mooney, F. B. Deacon, and George R. Deacon each received a cheque for \$4,922.94, and Campbell received the one for \$5,922.94.

George R. Deacon said he was told by his brother Frederick B. Deacon, a fortnight before, that he was to participate in the profits, and that Mooney and Campbell were also to be participators. Mooney said F. B. Deacon told him a week before the distribution that he (Mooney) was to participate. But Mooney would not admit that he knew of the good fortune that awaited him on the night the cheques were distributed. George R. Deacon said his brother told him that the cheques would be issued that night, and he provided bottles of champagne, which he brought with him, to celebrate the event. His brother Frederick B. Deacon accompanied

him, and, when they reached Mr. Campbell's office, Mooney was there, and left with the others after receiving his cheque; and the conclusion should be that he went there to receive the cheque and for no other purpose.

George R. Deacon and Mooney each received an additional \$2,000 in paid-up stock in the new company.

Frederick B. Deacon said he prepared a statement shewing the exact cost of the assets of the two companies he controlled; and Mooney wrote in an adjoining column what he considered the increased value of each asset was, "and his figures were taken as a basis for the prices set out in the option, which we considered a very reasonable figure."

The statement, with the two sets of figures, was not put in at the trial, but, as the statement (exhibit 15) put in by the plaintiffs contains figures said by Mr. Coughlin to have been made by Mooney, it may, I think, fairly be assumed that they represent the values of the different items placed there by Mooney. A very large item in the statement of the Deacon Company is "Franchise, \$8,550," which is explained by a question put to Frederick B. Deacon on his examination for discovery by counsel for the plaintiffs: "Q. This franchise was an agreement to cut ice upon a lake situate in the centre of the city of Stratford, and is practically the only local source from which the ice can be got? A. Practically so." This franchise had fifteen years to run from the time the option was given, and, with an increasing population in a large manufacturing city, it might not be considered an excessive valuation of the franchise.

The profit F. B. Deacon made on the properties taken over by the plaintiff company, he said, was \$27,000. He said that he made the full profit himself, and the cheques that were paid to Mooney, George R. Deacon, and Campbell, represent payments for transactions he had with these individuals. He said he gave A. M. Campbell the cheque for \$5,922 and paid-up stock in the plaintiff company for \$1,000 as pay for helping him with the deal and others, and that "Mooney got \$6,922.94 (the cheque for \$4,922.84 and \$2,000 paid-up stock in the plaintiff company) for aiding me and practically finding me purchasers for the companies I controlled, and for consideration by way of indorsements on this paper and other paper not necessarily connected with the company." George R. Deacon (who is a physician in Stratford) indorsed for his brother F. B. Deacon as

MacMahon, J.

1909

STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.

MacMahon, J.

1909

STRATFORD

FUEL

ICE

CARTAGE

AND

CONSTRUCTION Co.

v.

MOONEY.

required for both the businesses in which the latter was interested, and he received the cheque for \$4,922.92 and \$2,000 of paid-up stock in the plaintiff company; as F. B. Deacon said, he considered that the accommodation given entitled him to that.

George R. Deacon said his brother Frederick B. Deacon was the prime mover and was acting in the organisation of the new company; and F. B. Deacon admitted that he accompanied Mr. Robertson, one of the solicitors for the applicants for the charter, to the Parliament Buildings in case any explanation should be required by the officials as to the scope of the charter.

Mooney was a promoter, and said he was the one who formed the company, and retained Mr. Coughlin as solicitor to prepare the petition for the charter; and Mooney provided a number of the petitioners who were named as provisional directors of the new company. Sydney John Cook, who was head bookkeeper in Mooney's biscuit factory, was a petitioner, and is represented as subscribing for \$1,000 of the stock which Mooney paid for; and Malcolm Lachlan Leitch, a friend of Mooney's, was also a petitioner, and represented as subscribing for \$1,000 of the stock. He was one of the indorsers on the note for \$65,000 which was discounted by the Merchants Bank, and F. B. Deacon said it was understood, when he became indorser, that the \$1,000 of stock for which he subscribed would be taken care of by Mooney, and was paid for by him; and Charles E. Nasmyth, also a petitioner (a druggist in Stratford), is a director of the Mooney Biscuit and Candy Factory.

George R. Deacon and A. M. Campbell were in no way promoters of the new company, and had no connection with it, and George R. Deacon never subscribed for stock therein, as the \$2,000 stock he got was a gift from his brother F. B. Deacon. He (G. R. Deacon); therefore, stood in no fiduciary relation to the company. The same must be the finding as to A. M. Campbell.

If a profit were made on the sale of the Deacon Company and the cement company, they rightfully belonged to Frederick B. Deacon, as he virtually controlled the stock in the Deacon Company, and secured options on most of the other stock of that company, while he was sole owner of the cement block company some time before Mooney broached the subject of a new company to him.

Then did Frederick B. Deacon, being a promoter-vendor of the new company, and therefore standing in a fiduciary relation to it,



make a full disclosure of the profits he was making on the sale of the assets of the two companies controlled by him?

Frederick B. Deacon on his examination for discovery was asked: "Q. Do you know when your option was accepted? A. No, I don't. Q. It was while the first five provisional directors were still managing the affairs of the company? A. Yes. Q. Do you know who valued the properties mentioned in the option for the company in liquidation? A. I don't know, but understood a committee of three was appointed to check over the valuations. Q. There was a shareholders' meeting called to ratify the action of the directors? A. I understood so from the minute book."

If a committee was appointed to check over, it would probably have consisted of men from the city of Stratford who were experienced in business matters: They would check the estimate put on the assets of the two companies by exhibit 15, and, if they considered any items excessive, would have so reported to the directors. The directors of the new company knew from the option what Frederick B. Deacon was prepared to sell the assets at; and the difference between the figures in the estimate exhibit 15, and what he was asking in the option, were the profits he was making, and such profits could not be considered as secret profits. For instance, in exhibit 15 the estimated value of the assets of the Deacon Company is ..... \$39,971  
Deacon gives an option to purchase at..... \$40,000  
and the assumption by the new company of the liabilities... \$14,600  
He was therefore demanding a profit of nearly \$15,000 on the sale of the Deacon Company assets alone.

The value placed on the assets of the Stratford Cement Block Company in the statement was ..... \$ 9,950  
And the contracts on hand were \$6,995, and, supposing a profit of 40 per cent. could be made on them, it would represent ..... \$ 2,796  
Shewing a total of ..... \$10,756  
And Frederick B. Deacon gives an option to purchase at... \$25,000  
Profits on sale of Stratford Cement Block Co. would be... \$14,244

There was, therefore, no secrecy as to the profits Frederick B. Deacon was demanding to any one who saw the figures. He was receiving profits of nearly \$29,000 on the two businesses.

The position taken by Frederick B. Deacon on his examination

MacMahon, J.  
1909  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION CO.  
v.  
MOONEY.

MacMahon, J.

1909

STRATFORD

FUEL

ICE

CARTAGE

AND

CONSTRUCTION CO.

v.

MOONEY.

was that the proceeds of the note for \$65,000 when discounted should have been deposited to the credit of his account in the bank, and disbursed by himself.

It is said in *Glasier v. Rolls* (1889), 42 Ch.D. 436, 442, that a promoter-vendor cannot evade his liability by making disclosures merely to a board of directors who are under his influence or in his pay. But Lindley, M.R., in *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, [1899] 2 Ch. 392, at p. 426, said: "After *Salomon v. Salomon*, [1897] A.C. 22, I think it impossible to hold," as was held in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, "that it is the duty of the promoters of a company to provide it with an independent board of directors, if the real truth is disclosed to those who are induced by the promoters to join the company."

I cannot see what more could have been done by F. B. Deacon than furnish to the directors of the company a schedule of the assets belonging to the two companies proposed to be sold to the new company, with the prices attached, and an offer to the company to sell at a figure named in the option.

The action must be dismissed. There were some matters in connection with the sale that required investigation by the plaintiffs, and I therefore think it is not a case in which the plaintiffs should be called upon to pay costs, except the costs of George R. Deacon.

The plaintiffs appealed from the judgment of MACMAHON, J., directly to the Court of Appeal.

January 21 and 24. The appeal was heard by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

*G. C. Gibbons*, K.C., and *R. T. Harding*, for the plaintiffs. The evidence shews that the defendants had entered into a conspiracy to make a fraudulent purchase of properties in which they were interested, in the name of the plaintiff company, at an excessive value, and to divide amongst themselves the profits which would be realised by selling the company's stock to the general public. As far as the defendant Mooney is concerned, it is obvious that the transaction cannot stand. He was responsible to the company as a director and must account to it for any profit he received. The only way in which he could have cleared himself was by having an independent board of directors to whom a full disclosure should

be made of the fact that he and his co-defendants were interested in the sale and were to receive a large profit upon it. A disclosure to him by the defendant F. B. Deacon was no disclosure at all, and his own co-directors were not made fully aware of the circumstances. The learned trial Judge founded his view upon the well-known case of *Salomon v. Salomon*, [1897] A.C. 22, but that was the case of a private company where all the shareholders knew the real state of the facts, and altogether distinct from a case like the present, in which it was intended to appeal to the public, which was subsequently done with success. The real price paid for the property was about \$28,000 less than represented, and the four defendants were co-partners in a scheme by which the prospective shareholders were defrauded of this sum. All the defendants were, on the evidence, organisers and promoters of the company, and, as such, standing in a fiduciary relationship to the company, to which they are liable to account for the secret profit made by them. The following authorities were referred to: Lindley's Law of Companies, 6th ed., p. 514; Palmer's Company Precedents, 9th ed., pp. 108, 607; *Bray v. Ford*, [1896] A.C. 44, per Lord Herschell at p. 51; *Grant v. Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233; *Mayor, etc., of Saljord v. Lever*, [1891] 1 Q.B. 168; *Gluckstein v. Barnes*, [1900] A.C. 240, per Lord Macnaghten at pp. 248, 255; *Ruethel Mining Co. v. Thorpe* (1907), 9 O.W.R. 942, at p. 948; *Alexandra Oil and Development Co. v. Cook* (1907), 10 O.W.R. 781; *Gibson v. Barton* (1875), L.R. 10 Q.B. 329, at p. 338; *Wade v. Kendrick* (1905), 37 S.C.R. 32.

*Wallace Nesbitt*, K.C., and *R. S. Robertson*, for the defendant Mooney. There is no dispute as to the well-settled principles of law referred to by counsel for the plaintiffs; the question at issue is one of fact, as to whether the evidence brings the case within the authorities cited. When fraud is alleged, the plaintiff must prove his case in the clearest possible way. The examination for discovery of the defendant F. B. Deacon is not evidence as against Mooney. Deacon might have been examined on commission, or called as a witness at the trial. The alleged partnership between the defendants was a mere temporary affair, and could not be a basis for division of profits. At the time when the company was formed, Stratford was a growing town, everything looked prosperous, and Mooney as a business man was justified in approving of the purchase.

C. A.  
1910  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.

C. A.  
1910  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION CO.  
v.  
MOONEY.

*Brown's Case* (1873), L.R. 9 Ch. 102, shews that a director is not always bound to account for a gift from a promoter.

*F. H. Thompson*, K.C., for the defendant F. B. Deacon. This defendant was under no fiduciary relationship to the plaintiff company, nor did he try to conceal any profit he made. Even if the defendant Mooney should be considered liable as a director, that would not involve any liability on Deacon's part, as he was merely a vendor to the company. The distinction is shewn in the *Ruethel case* which has been referred to. He also cited *In re Hess Manufacturing Co.* (1894), 23 S.C.R. 644.

*G. G. McPherson*, K.C., for the defendant G. R. Deacon. This defendant is in a different position from either Mooney or F. B. Deacon, as he was neither a director nor an official of the company. Nothing was ever done under the alleged partnership between G. R. Deacon and the other defendants. If F. B. Deacon chose to divide up the profits he made out of the sale to the company, that was his own concern, and G. R. Deacon was not liable to account for the portion he received. The statement of the assets of the selling companies referred to in the evidence shewed only their tangible assets, and allowed nothing for their connection, which was of great value in a prosperous and growing city such as Stratford was at that time. G. R. Deacon was in no sense a vendor to nor a promoter of the company, but, having indorsed largely for his brother, he received from him a part of his profit as a present, voluntarily made in recognition of the liabilities he had undertaken.

*Gibbons*, in reply.

June 15. The judgment of the Court was delivered by Moss, C.J.O.:—The plaintiff company, now in liquidation, and John Brown, the liquidator, bring this action, under the authority of an order made in the liquidation proceedings, to recover from the defendants the sum of \$27,691.76, being moneys for which they are accountable to the plaintiffs. This sum represents part of the price (\$79,600) agreed to be paid and actually paid by the plaintiff company, in cash and debts assumed and paid, for the acquisition of the business and property of the Deacon Company Limited, an incorporated company, and the business and property of another business concern carried on under the name of the Stratford Cement Block Company. The defendants do not deny the receipt by each



of them of sums which in the aggregate make almost the sum of \$27,691.76, but they deny all liability to account therefor to the plaintiffs.

The manner in which the amount reached the defendants' hands was shortly as follows. The plaintiff company was promoted and incorporated at the instance of and mainly through the intervention and exertions of the defendants Mooney and F. B. Deacon, with the object of acquiring and taking over the business and property of the two concerns above-named. The defendant Mooney was a shareholder in the Deacon Company to the extent of \$500. The letters patent of incorporation of the plaintiff company do not make special reference to those two concerns, but they specify the purpose and objects of the company to be: (a) to buy, sell, manufacture, and deal in fuel, ice, and building and construction material; (b) to construct buildings, pavements, sidewalks, and other structures; and (c) to carry on the business of carters and carriers, and, with a view thereto, acquire and undertake the whole or any part of the business, property, undertakings, and liabilities of any person or company carrying on any business which the company is authorised to carry on. And, beyond doubt, the latter part of (c) enabled the company to deal for the acquisition of the two business concerns in question.

Shortly after incorporation, an offer to sell the business and property of these two concerns to the plaintiff company was made in a writing under the signature and seal of the defendant F. B. Deacon. In brief, the offer was to sell the goodwill of the Deacon Company Limited, together with the real estate, plant, machinery, office furniture, leases, licenses, horses, waggons, etc., of the company, the book and other debts due and owing to the company and the securities therefor, and all pending contracts, cash in hand or in banks, and bills and notes held by the company, for the sum of \$40,000, and the assumption by the plaintiff company of the liabilities of the Deacon Company, amounting to \$14,600; also the goodwill of the business of the Stratford Cement Block Company, together with the real estate, plant, machinery, patents, stock in trade, implements, etc., for the sum of \$25,000. This offer bears date the 27th June, 1905.

On the 4th July the board of directors of the plaintiff company met, and, having first elected the defendant Mooney president of

C. A.

1910

STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.

Moss, C.J.O.

C. A.  
1910  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUC-  
TION Co.  
v.  
MOONEY.  
Moss, C.J.O.

the company, and appointed C. E. Nasmyth, another member of the board, as managing director, passed a by-law accepting the defendant F. B. Deacon's offer and authorising the president and managing director to execute all instruments and do all acts necessary for carrying out the agreement and taking over the properties. On the same day there was a meeting of shareholders, consisting of the five members of the board of directors, at which the by-law was ratified. No further meeting of the directors appears of record until the 8th February, 1906, but it appears that C. E. Nasmyth declined to act as managing director of the plaintiff company, and the defendant F. B. Deacon was appointed to or assumed the duties of that office. This seems to have been in pursuance of an offer on his part contained in a letter to the defendant Mooney, dated the 28th June, 1905. Afterwards the by-law was acted upon by the execution and delivery by the Deacon Company Limited to the plaintiff company of an instrument dated the 24th July, 1905, whereby it was agreed that the Deacon Company sell and the plaintiff company purchase the property and assets of the Deacon Company as specified in the instrument, and it was stipulated that part of the consideration should be the sum of \$40,000, payable on the 1st August, and as the residue of the consideration the plaintiff company should undertake to pay, satisfy, discharge, and fulfil all debts, liabilities, contracts, and engagements of the Deacon Company in relation to the business, and indemnify it against all proceedings, claims, and demands in respect thereof. And, further, that the purchase be completed on the 1st August, when possession of the premises should be given to the plaintiff company and the cash consideration paid. Nothing corresponding to this appears to have been done in relation to the Stratford Cement Block Company, but both businesses were taken over on or about the 1st August. The defendant F. B. Deacon had become managing director of the plaintiff company before these dealings and transactions took place. He was also managing director of the Deacon Company, and signed the instrument of the 27th July in that capacity.

At this time it was contemplated that the plaintiff company was to make the cash payment of \$40,000 in respect of the Deacon Company and \$25,000 in respect of the Stratford Cement Block Company with moneys derived from the sales of shares in the

plaintiff company, which were then being offered to the public. But the public did not respond with much alacrity, and the matter appears to have drifted along until the first week in September.

As the defendant Mooney testified, the shares were not selling very readily. The defendant F. B. Deacon was anxious for his money, but funds were not coming in. The matter was discussed by him and the directors, and from him or the defendant Mooney, or perhaps both, came the suggestion that a note for \$65,000 should be made by some of the directors and discounted at the Merchants Bank at Stratford. The defendant Campbell was manager of the bank, and through him it had been making advances from time to time to the Deacon Company and the defendant F. B. Deacon. He appears to have taken a good deal of interest in the defendant F. B. Deacon and his business, and he was aware of the sale to the plaintiff company. Campbell was seen by the defendants Mooney and F. B. Deacon, and agreed to discount the note, provided some of the directors of the plaintiff company whom he named became parties to it. Through the agency of the defendant Mooney and on the strength of certain inducements held out to them, two of the other directors, *viz.*, Messrs. J. J. Coughlin and M. L. Leitch, joined with the defendants Mooney, F. B. Deacon, and G. R. Deacon in indorsing a promissory note for \$65,000, dated the 6th September, and made and signed on behalf of the plaintiff company by the defendant F. B. Deacon as managing director.

The defendant Campbell, as manager of the Merchants Bank, discounted the note as previously arranged, and the proceeds, \$64,425.51, were placed in the bank to the credit of the plaintiff company's account. Then, by a cheque drawn and signed by the defendant F. B. Deacon on behalf of the plaintiff company, the amount was transferred to the plaintiff company's credit in a special account. And out of the moneys so standing to the plaintiff company's credit in this special account the defendants among them received at least the sum of \$25,947.76; and the following was the manner of division, as far as can be gathered from the documents and the very unsatisfactory testimony relating to the matter. There is a lack of recollection of details on the part of those of the chief movers and actors in this somewhat large financial transaction who gave testimony at the trial, that is, to say the least of it, somewhat surprising. The defendant F. B. Deacon, having left the Province,

C. A.

1910

STRATFORD

FUEL

ICE

CARTAGE

AND

CONSTRUCTION CO.

v.

MOONEY.

Moss, C.J.O.

C. A.  
1910  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUC-  
TION CO.  
v.  
MOONEY.  
Moss, C.J.O.

was not examined as a witness at the trial. Parts of his depositions on examination for discovery taken under commission in British Columbia were read, but of course could not be received as evidence against his co-defendants. So far as read, however, they do not appear to vary to any considerable extent from the testimony at the trial, which shews that, upon the opening of the special account for the \$64,425.51, the defendant F. B. Deacon drew thirteen cheques against it, signed by him as manager of the plaintiff company. Of these six were for varying sums, and amounted in the aggregate to \$38,477.75, leaving \$25,947.76, which amount was covered by the remaining seven cheques. These were:

- |  |             |
|--|-------------|
| (1) Cheque to the defendant Mooney for.....  | \$ 4,922.94 |
| (2) Cheque to the defendant Mooney for.....  | 500.00      |
| (3) Cheque to the defendant G. R. Deacon for ..  | 4,922.94    |
| (4) Cheque to the defendant G. R. Deacon for ..  | 500.00      |
| (5) Cheque to the defendant F. B. Deacon for ..  | 4,256.00    |
| (6) Cheque to the defendant F. B. Deacon for ..  | 4,922.94    |
| (7) Cheque to order of the defendant F. B. Deacon<br>and indorsed by him to the defendant<br>Campbell for..... | 5,922.94    |

---

\$25,947.76

A meeting took place at Campbell's dwelling in the Merchants Bank building on the evening of the 6th September, at which only the defendants were present. Each of them received the cheques payable to him, but very little information is supplied as to what was said or done.

There can be no question that each one went there knowing the purpose for which he went, but all disclaim knowledge of the reason for the presence of the others. And, according to the statements of the defendant Mooney, there was a considerable amount of secrecy observed in handing out the cheques. There was an atmosphere of silence and mystery which it would seem the contents of a bottle of champagne brought to the meeting by the defendant G. R. Deacon did not dissolve. According to the latter, there was much more of a mutual understanding and far more openness of conduct. But there is a failure on the part of both to furnish any satisfactory account of what took place or the reasons for meeting at all in the way they did. If any unfavourable in-



ferences are to be drawn from the reticence or want of recollection of the defendants who testified, they must blame themselves. The defendants were knowingly receiving part of the proceeds of a sale to the plaintiff company of the properties and assets of two business concerns, in one of which—the Deacon Company—the defendants F. B. Deacon, G. R. Deacon, and Mooney were shareholders and financially interested, while at the same time the defendant Mooney was the president and the defendant F. B. Deacon was the manager of the plaintiff company, the purchasers. And these three defendants were also interested in the fortunes of the other concern—the Stratford Cement Block Company—the defendant F. B. Deacon as the proprietor and the other two as persons who had for some years been lending it the support of their indorsement and credit at the bank, if indeed they were not otherwise interested in it. To all appearance the defendants G. R. Deacon and Campbell held no relation, fiduciary or otherwise, towards the plaintiff company. But, if the sale to the plaintiff company was one through which the defendants Mooney and F. B. Deacon were improperly deriving a profit at the expense of the plaintiff company, it is not difficult to see why the defendants G. R. Deacon and Campbell were included in the division; the first because of his monetary interest in the Deacon Company and his financial support of his brother in the other concern, the other because of his friendly intervention as a banker to enable the purchase-moneys to be received at a time when the financial condition of the plaintiff company was not such as to enable the payment to be made out of its own funds. They all knew that in order to procure the funds for the plaintiff company the appeal to the public to take shares was to be pressed, and that the money of persons induced to become shareholders was to be used to retire the \$65,000 note, as well as to pay off the liabilities of the Deacon Company, which, by the agreement of the 27th July, the plaintiff company had undertaken to discharge.

And, if the moneys they were receiving on the night of the 6th September were trust funds for which the defendants Mooney and F. B. Deacon were bound to account to the plaintiff company, the defendants G. R. Deacon and Campbell are not entitled to withhold from the plaintiff company the amounts which came to their hands respectively. They received them with knowledge of the facts and must be bound by the result in law. If, on the part of the de-

C. A.  
1910  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.  
Moss, C.J.O.

C. A.  
1910  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.  
Moss, C.J.O.

defendants Mooney and F. B. Deacon, there was a breach of a fiduciary duty or trust towards the plaintiff company, the defendants G. R. Deacon and Campbell participated in the fruits and are liable to restore that which came to their hands.

The defendants contend that the moneys divided amongst them were the property of the defendant F. B. Deacon, who was entitled to receive the purchase-price to be paid by the plaintiff company, that they came to him as representing the vendors, and that he was entitled to dispose of them as he saw fit. No doubt, if he could retain them as against the plaintiff company, he could do with them as he pleased. The question is, had he the right to the amount so divided as against the plaintiff company?

The learned trial Judge found, and it is really not in dispute, that a sum of \$27,691, or thereabouts, represented the profit to the defendant F. B. Deacon upon the sale to the plaintiff company. But the learned Judge also found that for this profit the defendant F. B. Deacon was not accountable to the plaintiff company—that it was not a secret profit, but part of a price paid by the plaintiff company for property which it had, through its board of directors, agreed to purchase, after due consideration.

But the question is, was the agreement made and entered into on behalf of the plaintiff company by an independent board of directors, to whom full disclosure had been made, and who were fully aware of the interests of the defendants F. B. Deacon and Mooney in the transactions?

To answer this it is necessary to ascertain the relative positions of the defendants Mooney and F. B. Deacon toward the plaintiff company and the selling concerns, and also to inquire into the formation, constitution, and qualifications of the board of directors who were acting for the plaintiff company during and in the course of the transaction.

It is not questioned that the plaintiff company was the creation of the defendants Mooney and F. B. Deacon for the very purpose of taking over the two concerns in which both were interested, as already described. They were promoters of the plaintiff company in every sense of the word. It was not intended that the company to be formed should be one of that class not infrequent in the present day in which the shares, or the chief part of them, are to be allotted to the owner or owners of the business concern intended.

to be taken over, in consideration of the transfer of the property and business, such as in the well-known case of *Salomon v. Salomon*, [1897] A.C. 22. In the case before us it is manifest that from the beginning the intention was that ready money or its equivalent should be paid for the properties and businesses to be acquired, and that the required cash should be obtained by the issue to the public of the shares in the capital stock of the company when formed. The difference between the two cases, which is obvious, is alluded to by Lord Watson in the *Salomon* case, at p. 37, where he remarks: "But in this case the agreement . . . was, in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were, or were likely to be, members of the company;" and by Lord Macnaghten, at p. 48, where he says: "The company was intended from the first to be a private company; it remained a private company to the end. No prospectus was issued; no invitation to take shares was ever addressed to the public." Here the intention and the course adopted were otherwise. For the purposes of procuring incorporation, five persons subscribed the memorandum of agreement, each agreeing to take ten shares of \$100 each. These persons were: the defendant Mooney and Messrs. M. L. Leitch, C. E. Nasmyth, S. J. Cook, and J. J. Coughlin. The defendant Campbell, who was apparently taking a somewhat active part in the formation of the company, was a friend of Leitch, and joined the defendant Mooney in inducing him to become a subscriber, and, as appears, his shares were afterwards paid for by the defendant F. B. Deacon.

Nasmyth, a druggist, was induced to subscribe by the defendant Mooney, upon the understanding that his shares would be "taken care of" by the defendant F. B. Deacon. Something is said by the defendant Mooney about its being contemplated that this druggist should become the manager of the company, in which case he would pay for his shares. But, although the form of appointing him managing director was gone through with, he never acted, and the defendant F. B. Deacon was from the first the manager, and apparently did take care of Mr. Nasmyth's shares. Cook was an accountant in the defendant Mooney's biscuit factory, and his shares were to be "taken care of" by Mooney.

Coughlin was the solicitor who prepared the papers and took the necessary steps for procuring the issue of the letters of incor-

C. A.  
1910  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION CO.  
v.  
MOONEY.  
Moss, C.J.O.

C. A.  
1910  
STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.  
Moss, C.J.O.

poration. He came into it at the suggestion of the defendant F. B. Deacon. He appears to have made a note for \$800, presumably part of the \$1,000 payable on his shares, and this note was afterwards paid out of the proceeds of the discount of the \$65,000, in which he joined.

These five persons were the provisional directors named in the letters of incorporation, and they were the persons to whom the defendant F. B. Deacon's offer to sell was submitted. They represented fifty out of the one thousand shares which comprised the capital stock of the plaintiff company, and the remainder were to be offered to the public.

Certain statements of the property and assets of the two Deacon concerns were prepared, but the originals are not produced. However, it appears that they were gone over by the defendants Mooney and F. B. Deacon, and they agreed upon the values to be assigned to them.

The evidence makes it clear that this proceeding was of a very perfunctory character, and there was in truth no attempt at any examination or scrutiny by any of the other members of the board. They seem to have accepted the defendant Mooney's representations in the matter, and to have been willing to rest on a very general outside knowledge of the business and affairs of the two Deacon concerns.

Thus the affair was really arranged between the defendant F. B. Deacon, the vendor, and at the same time the real manager of the plaintiff company, and the defendant Mooney, the president of the plaintiff company, and at the same time interested in the selling concerns.

There is no evidence on which it could be fairly concluded that the directors as a board acted with full knowledge of the transaction and of the relations of the vendor towards the plaintiff company, which they were supposed to represent. Nor can it be held that they formed an independent board, dealing not for themselves alone, but for and in the interests of the persons to whom they intended to apply to become shareholders and invest their money in the company. In the then existing state of affairs, it could not be said that "the executive management of the company was in the hands of a thoroughly independent board of directors, a board over which [the vendor] could exercise no influence, and which would, as the



expression is, keep him at 'arms' length' in making the bargain." See *In re Hess Manufacturing Co.*, 23 S.C.R. 644, at p. 658.

To place the affairs of the plaintiff company in the hands of such a board was a duty which the defendants F. B. Deacon and Mooney, in their relation to the plaintiff company, both as promoters and as manager and president respectively, owed to the future shareholders of the plaintiff company. It is not pretended that any of the transactions which have been disclosed, or probably only partially disclosed, in this action, were made known to any shareholder other than the members of the board, and as to four of them only to the limited extent shewn by the testimony.

The result seems to have been that the defendant F. B. Deacon was enabled to obtain for the property and assets which he was selling to the company, of which he was one of the promoters and an officer, a price which brought him a very large profit. This he might possibly have been able properly to make had the bargain for it been made in a different fashion. But, as the matter was initiated, carried on, and concluded, the plaintiff company was not fairly or properly represented in the bargaining, and for this the defendants F. B. Deacon and Mooney were responsible. And therefore, to the extent to which each shared in the profit made, he should be held liable.

The defendants G. R. Deacon and Campbell should, for reasons already given, be held liable to the extent to which they shared.

Probably the most convenient manner of fixing their liability is to direct judgment against each for the amounts received by them by the cheques issued on the 6th September, 1905, with interest from that day. But, if any question arises, the matter may be spoken to in Chambers.

The appeal should be allowed and judgment entered for the plaintiffs as indicated.

The case is not one in which any one of the parties should be ordered to pay the whole amount.

The liability to such a judgment would in any case be limited to the defendant F. B. Deacon. It is to be noted that the learned trial Judge refers to the defendant Campbell as being deceased, but this was a misapprehension owing to some remark at the trial. He made no defence, and counsel conceded that the question as to him would be governed by the decision as to the others.

The plaintiffs are entitled to their costs throughout.

C. A.

1910

STRATFORD  
FUEL  
ICE  
CARTAGE  
AND  
CONSTRUCTION Co.  
v.  
MOONEY.

Moss, C.J.O.

## [IN THE COURT OF APPEAL.]

C. A.

1910

June 15.

BURMAN V. OTTAWA ELECTRIC R.W. Co.

*Street Railways—Injury to Passenger—Negligence—Cause of Injury—Sudden Jerk in Starting Car—Withdrawal from Jury by Charge—Misdirection—Premature Starting of Car—Finding of Jury—New Trial—Objection not Taken at Trial—Real Question not Passed upon.*

The plaintiff, immediately after entering a car of the defendants, and before she had reached a seat, was, from some cause, thrown down backwards and injured. In an action against the defendants for damages, the negligence charged in the statement of claim as the cause of the fall was "the sudden jerking forward of the car," and this was supported by the evidence of the plaintiff herself and of two other eye-witnesses of the occurrence. Evidence was called for the defence to shew that the car was new and in good condition, that only the lowest notch was used in putting on the power, and that there was no unusual jerk. The trial Judge in his charge practically withdrew from the jury the consideration of the alleged jerk as the cause of the fall, but told the jury to consider whether the conductor was negligent in starting the car before the plaintiff (an aged person) was seated. The jury found that the defendants' servants were negligent in starting the car before the plaintiff was in a position to save herself from falling; and the trial Judge directed judgment to be entered for the plaintiff. There was some mention in the evidence of the premature starting of the car, but it was not put forward as an independent cause of complaint until the Judge emphasised it in his charge. Neither party made any objection to the charge. The defendants appealed from the judgment, but the plaintiff did not, by cross-appeal or otherwise, raise an objection to the practical withdrawal from the jury of the chief cause of complaint:—

*Held*, that the question of the jerk should not have been withdrawn from the jury; there was but one incident, made up of the conduct of the conductor in giving the signal and that of the motorman in obeying it; and it should have been left as one question to the jury. The finding actually made could not, upon the evidence, be supported.

*Held*, also, that the circumstance that an objection was not taken at the proper time was not necessarily fatal.

*Brenner v. Toronto R.W. Co.* (1907), 15 O.L.R. 195, 198, and *Woolsey v. Canadian Northern R.W. Co.* (1908), 11 O.W.R. 1030, 1036, followed.

*Held*, also, that it was to be inferred that the jury (influenced by the Judge's remarks) did not consider the evidence upon the question of the jerk, and that their finding did not imply that that question was determined in favour of the defendants.

*Held*, also, that the real question in issue not having been passed upon by the jury, there was power to direct a new trial; MEREDITH, J.A., dissenting.

*Jones v. Spencer* (1897), 77 L.T.R. 536, followed.

*Per* MEREDITH, J.A., that the defendants' appeal should be allowed and the action dismissed; the case was the rare one of an accident for which no one could be justly blamed; and the Court had, in the circumstances, no power to direct a new trial.

APPEAL by the defendants from the judgment of BRITTON, J., in favour of the plaintiff, upon the finding of a jury, in an action for damages for injury said to have been caused to the plaintiff, while a passenger on the defendants' street railway, by the negligent operation of a car which the plaintiff, a woman nearly seventy

years old, had just entered when she was thrown down backwards by the motion of the car, and so injured.

The negligence alleged was "the sudden jerking forward of the car."

The finding of the jury was as follows: "We find the company's servants negligent in starting the car before the plaintiff was in a position to save herself from falling: damages, \$1,882."

Judgment was entered for the plaintiff for that amount.

May 3. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*D. L. McCarthy*, K.C., for the defendants. The only ground of negligence on which the verdict can be supported is that the car should not have been started until the plaintiff had an opportunity of seating herself. It is submitted that this does not constitute a case of negligence *per se*, and that, in the circumstances disclosed in the evidence, the conductor was justified in starting the car when he did: *Dochtermann v. Brooklyn Heights R.W. Co.* (1898), 32 N.Y. App. Div. 13. There is no finding of the jury that the accident was caused by the car starting with too sudden a jerk, and the learned trial Judge practically withdrew that branch of the case from the jury.

*A. E. Fripp*, K.C., for the plaintiff. The evidence was sufficient to support the finding of the jury that the defendants were guilty of negligence. The plaintiff was in the act of moving from the vestibule to the body of the car when she was thrown down. The plaintiff is entitled to succeed on both branches of the case, (1) because the car was started before she had reached a place of safety, and (2) because it was started with too sudden a jerk. The following authorities were referred to: Beven on Negligence, 3rd ed., p. 988; *Burris v. Père Marquette R.W. Co.* (1904), 9 O.L.R. 259; *Keith v. Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116; *Taylor v. Manchester Sheffield and Lincolnshire R.W. Co.*, [1895] 1 Q.B. 134; *Kelly v. Metropolitan R.W. Co.*, [1895] 1 Q.B. 944; *Buliner v. London Chatham and Dover R.W. Co.* (1885), 1 Times L.R. 534.

*McCarthy*, in reply. The plaintiff based her case on the sudden jerk with which the car was started, and no evidence was given as to her position, the point as to which arose in the Judge's charge for the first time.

C. A.  
1910  
BURMAN  
v.  
OTTAWA  
ELECTRIC  
R.W. Co.

C. A.  
1910  
BURMAN  
v.  
OTTAWA  
ELECTRIC  
R.W. Co.  
Garrow, J.A.

June 15. GARROW, J.A.:—On the 2nd day of May, 1909, the plaintiff, an elderly but still active woman (aged sixty-nine years), with her daughter-in-law, Mrs. Burman, had entered the defendants' car, and, before the plaintiff had reached a seat, she was, from some cause, thrown down backwards and severely injured.

The cause of the fall, as set out in the statement of claim, is "the sudden jerking forward of the car." And this is supported by the evidence of the plaintiff herself, who says: "Well, the car started in a jolt before I had time to enter the car, while I stood in the vestibule; it started with a jerk and knocked me backwards—very sudden jerk;" by the daughter-in-law, who says: "She (the plaintiff) was ahead of me, and, as I was coming up the steps, she walked over to enter the car out of the vestibule into the car, and the car started with an unusually sudden jerk, and threw her straight back just as she was going to enter the car. I was behind her coming in, and the car started quite violent and jerked her back, and she hit her hip coming back and struck her head;" and by Mrs. Theresa Smith, a witness who was standing in the street and saw the car starting. She saw the plaintiff, whom she knew, and her daughter-in-law, get upon the car and saw the start off, which she described as, "Well, the car started with a sudden jerk, and she fell back."

Evidence was called for the defence to shew that the car was new and in good condition, that only the lowest notch was used in putting on the power, and that there was no unusual jerk.

In the course of his charge to the jury Britton, J., said: "The charge of negligence is two-fold. The plaintiff says, first, that the conductor rang the bell to start before she had reached a seat, before she had become seated, and that she was in a position which it was dangerous for her to be in when the car would start as it did start in obedience to the conductor's bell. Then it is said, secondly, that the motorman was guilty of negligence in starting this car, in that, instead of starting it slowly and gradually, he did so with a jerk. I will deal with that last first, because it seems to me to be pretty well cleared out of the way by the evidence that this car was a new one, of the best kind made, it is said, and there was no evidence to contradict that, that it was thoroughly equipped with the best appliances that can be obtained from



the manufacturers of that kind of thing. . . . The electrician who equipped it says that you cannot start that car in any other way than that in which it was started; if the motorman's evidence is true. . . . Now, the evidence of the motorman is that he only moved the lever to the first notch, and, if the electrician's evidence is true, then you could hardly say, I think, that there was any negligence on the part of the motorman in doing what he did on that occasion. On the undisputed evidence, it is difficult to see how any negligence on the part of the motorman can be found."

The learned Judge then proceeded upon the other point, namely, whether the conductor had acted negligently in giving the signal to start, upon which he said: "When we come to the conductor, the matter is an entirely different one. I do not lay down to you any rule of law that would require every passenger at all times upon entering a car to be seated before the conductor rang the bell to start. . . . But I say this to you, that in a case of this kind, where there was sitting-room in the car, as has been established, where the plaintiff was a woman of years, when she enters, whether her foot was upon the door-step or not, or whether she was inside the car or not, then it may be a question whether the conductor was guilty of negligence in starting the car as he did on this occasion. Did he start the car when the woman apparently had not hold of the seat, and when she was not supporting herself by her hands at the door of the vestibule. When she was unsupported either in the position that she states or in the position stated by the conductor, and when she had got that far and no farther, did he start the car, and was the result of his starting it that she fell and was injured? . . . I leave it to you to say, taking into consideration all the circumstances you have heard detailed, was it negligence on the part of the conductor at that time and with that car to start as he did with this old lady unsupported, and when the natural result of such a start might be to cause her to fall and to be injured?"

No questions were submitted. The jury found in favour of the plaintiff, the finding being in writing and expressed as follows: "We find the company's servants negligent in starting the car before the plaintiff was in a position to save herself from falling: damages \$1,882." And judgment for that amount was entered in favour of the plaintiff.

C. A.  
1910  
BURMAN  
v.  
OTTAWA  
ELECTRIC  
R.W. Co.  
Garrow, J.A.

C. A.  
1910  
BURMAN  
v.  
OTTAWA  
ELECTRIC  
R.W. Co.  
Garrow, J.A.

The defendants now complain that the finding ignores and in effect denies the cause of action first put forward in the pleadings, and which formed the main feature of the evidence, namely, the jerk, and is based upon something entirely insufficient and in any event quite different, namely, the premature starting of the car, a subject to which their attention had in no way been directed until it was put forward so prominently in the charge.

This would, I think, have been a serious objection if the defendants had objected to the charge, for it is apparent from a perusal of the proceedings in the printed case that the main feature at the trial certainly was the jerk, the other, which was only, I think, mentioned three times in the evidence, having more the appearance of an incidental circumstance, rather than an independent cause of complaint, the real cause of complaint being not so much the time at which the car was started, as the mode of starting.

Another objection which might, I think, have been taken to the charge, this time by the plaintiff, was the practical withdrawal from the jury of the question of the jerk. In doing so the learned Judge evidently proceeded upon the basis of the motorman's evidence being true, which was, I think, entirely a question for the jury. The evidence on the plaintiff's side to which I have referred very distinctly shewed that the car was started with a jerk of more or less violence. And the nature and violence of the plaintiff's fall, which was backward, and with sufficient force to break her thigh-bone, in itself supports this evidence.

That was the case which the defence was called upon to meet. And whether it had been sufficiently met depended entirely upon whether the motorman told the truth when he swore that he only opened up to the first notch, for, if he went beyond that, the jerk would be accounted for, and, on the other hand, if he did not, there should have been no jerk.

Speaking for myself, I cannot understand why it was deemed advisable to divide the case into two branches. There was, in fact, but one incident, made up of the conduct of the conductor in giving the signal and that of the motorman in obeying it.

The first, alone, would probably have been quite harmless if the car had been started properly, and the second would also probably have been harmless if a moment more had been allowed for the plaintiff to reach a seat or something to hold by. Under

these circumstances the proper course, in my opinion, was, with deference, to have left the whole question to the jury, and not merely that of the conduct of the conductor.

Of course, if the finding had been simply, as it might have been, in favour of the plaintiff, without reasons, we could not have interfered, for then the result might, notwithstanding the learned Judge's remarks about the jerk, have been attributed to either or to both causes.

And, if the evidence was reasonably sufficient to support the finding actually made, no objection having been taken at the trial, our proper course would probably be not to interfere. I incline to think, however, that, if the jerk is excluded, what is left of the plaintiff's case would be too weak and insufficient to justify a verdict of negligence against the defendants. And yet it would, under all the circumstances, be unfair to permit the defendants to take advantage of this view, in the face of the other objection to the charge to which I have referred. The question, therefore, really becomes one of whether, under the circumstances, a new trial should not be granted.

As has been recently pointed out in this Court, the circumstance that an objection was not taken at the proper time is not necessarily fatal. See *Brenner v. Toronto R.W. Co.* (1907), 15 O.L.R. 195, at p. 198; *Woolsey v. Canadian Northern R.W. Co.* (1908), 11 O.W.R. 1030, 1036.

And upon the question of granting a new trial where the real question in issue has been imperfectly submitted to or has not been apparently passed upon by the jury, see the case of *Jones v. Spencer* (1897), 77 L.T.R. 536, in which Lord Herschell says (p. 538): "I think that the hesitation of a Court to set aside the verdict of a jury is very natural, and that it is expedient that verdicts of juries, when that is the tribunal to determine the question between the parties, should not be set aside, except where one is satisfied that there has been a miscarriage, because a verdict has been found that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, and to the question in issue which they had to determine. But it seems to me to be a condition of any such rule that the question which had to be determined should have been so left to them that one is satisfied it was before their minds, that their minds were applied

C. A.

1910

BURMAN

v.

OTTAWA

ELECTRIC

R.W. Co.

Garrow, J.A.

C. A.

1910

BURMAN

v.

OTTAWA

ELECTRIC

R.W. Co.

Garrow, J.A.

to it, and that they did really on the determination of that question give their verdict."

Applying these remarks to this case, it seems to me the proper conclusion is, that, adopting the remarks of the learned Judge as a practical withdrawal from them of the question of the jerk, the jury did not consider the evidence upon that question, and consequently, in bringing in the finding which they did, did not intend to imply that they found upon that question in favour of the defendants.

I would, therefore, under all the circumstances, allow the appeal and direct a new trial; the costs of the last trial and of this appeal to be in the cause to the successful party.

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., concurred.

MEREDITH, J.A.:—The plaintiff's claim was based upon two grounds: (1) violently starting the car; and (2) starting it before she was seated.

The jury found in favour of the plaintiff on the second ground, but not upon the first. In the jury's own words, the only negligence found was "in starting the car before the plaintiff was in a position to save herself from falling."

The plaintiff was fully on board, as her daughter-in-law who was some distance behind her and was accompanying her before the signal to go on was given, said.

It is surely not negligence, in such a case as this, merely to start a car before passengers boarding it are seated.

There was no finding, nor any evidence, that the plaintiff was so infirm a person as to need assistance; on the contrary, the evidence of her daughter-in-law was that "she was pretty smart on her feet;" and, beside that, her daughter-in-law was with her, and capable of assisting her if assistance were needed.

Mr. Fripp was driven to the contention that, in all cases, it is negligent to start a car before all passengers, who desire to, and can, be seated, are seated: a position wholly untenable.

The case, on the jury's findings, and in truth apart from them, is one of an accident for which no one can be justly blamed; a thing seldom, but sometimes, happening.

I would allow the appeal.



I am unable to agree with the other members of the Court, who have now reached the conclusion that there ought to be a new trial of this action.

In the first place, what power has this Court to direct a new trial for misdirection, not only without any objection having been made to the charge, at the trial, but without any such objection, or *any motion, appeal, or application* for such relief, to this, or any other, Court, based upon such misdirection, having been made at any time since? It is obvious, I think, that, if any such relief as a new trial were desired, the plaintiff should have objected to the charge, and have sought in some manner to obtain a new trial upon that branch of the case, if she failed upon the other. It seems to me to be going quite too far to direct a new trial because of a direction with which both parties were satisfied at the trial, and, indeed, ever since have been; so much so that no such point was made upon this appeal, and there was no discussion of it here; a course on the part of both parties which seems to me to have been quite reasonable, for I can find nothing unreasonable or unfair in the charge. Nor can I find anything to support an assertion that any part of the case was withdrawn from the jury: an expression of a trial Judge's views of the facts is something far removed from that. The deliberate finding of the jury upon a question which was submitted to them, and which they knew was theirs alone to determine, ought not to be disturbed because some Judges, or Courts, may not like it: see *Toronto R.W. Co. v. King*, [1908] A.C. 260: see also *Eyre v. Highway Board of New Forest Union* (1892), 8 Times L.R. 648.

---

C. A.

1910

BURMAN

v.

OTTAWA

ELECTRIC

R.W. Co.

Meredith, J.A.

[RIDDELL, J.]

1910

PRICE V. PRICE.

June 16. *Husband and Wife—Alimony—Cruelty—Refusal to Supply Clothing—Wife Living in Husband's House—Remedy.*

In an action for alimony, the plaintiff charged the defendant with cruelty. She was called as a witness at the trial, and it appeared that she was living under her husband's roof, though not occupying the same bed, and was supplied with food. She did not desire resumption of marital intercourse, but did want more than just her living; and the Court was asked to make an order that the defendant should pay her so much a month or so much a week, she living all the time under his roof, as she had no means of clothing herself, and the defendant had notified the tradesmen in the town where they lived not to supply her with clothing. Upon these facts appearing, and the nature of the claim being explained, the trial Judge refused to go on with the inquiry as to the alleged previous cruelty, etc.:—

*Held*, that, in such circumstances, the wife was not entitled to alimony. The law, so long as a wife remains in her husband's house, enables her to enforce the marital obligation to supply her with clothing, only by a circuitous route, by pledging the credit of her husband for necessities.

ACTION for alimony. The facts are stated in the judgment.

June 14. The action was tried before RIDDELL, J., without a jury, at North Bay.

*G. F. Mahon*, for the plaintiff.

*J. Mitchell*, for the defendant.

June 16. RIDDELL, J.:—The plaintiff sues her husband, alleging in the statement of claim that shortly after the marriage he began to exhibit a very bad temper, and she had to leave him because he became so violent and abusive; that he struck her frequently, tore her clothes, etc., neglected her, and at times has failed to provide her with proper food, fuel, clothing, and medical attendance.

In August, 1905, an agreement for separation was entered into, under which they lived apart for a year; but in August, 1906, they came together again. The defendant resumed his cruel treatment, but in January, 1908, the plaintiff, the defendant, and family, removed to Cobalt. In April, 1909, he kicked her out of bed, and since that time they have been occupying separate beds. The defendant has neglected and refused to provide the plaintiff with sufficient money and clothing, and in January, 1910, notified the stores in Cobalt not to supply her with goods upon the defendant's credit. They are still occupying separate apartments, and she claims alimony.

The defendant denies all charges of impropriety or physical violence except in self-defence, and says the plaintiff has made his life one of misery by her violent outbursts of temper and by personal violence—and further that she is still living with him and he is supporting and maintaining her in a proper way.

At the trial the plaintiff was called as a witness, and it appeared that she was living under her husband's roof, though not occupying the same bed, and she was supplied with food. She did not desire resumption of marital intercourse, but did want more than just her living; and I was asked to make an order that the defendant should pay her so much a month or so much a week, she living all the time under his roof, and never since they had come together after the temporary separation having left his roof, as she had no means of clothing herself, and the defendant had notified the stores not to supply her with clothing.

Upon these facts appearing, and the nature of the claim being explained by the plaintiff's counsel, with his client in the box, I refused to go on with the inquiry as to the alleged previous cruelty, etc.

The right to grant alimony is found in the Ontario Judicature Act, sec. 34: "The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights." I can find no precedent for granting alimony under such circumstances.

No doubt, "one of the first duties which a husband undertakes towards his wife is to maintain and support her, so long as the marriage relation continues and so long as the wife remains faithful to him:" Lush on Husband and Wife, 3rd ed., p. 19. And "this duty of the husband is one which is, and always has been, directly enforced by the Ecclesiastical Courts by a decree of alimony accompanied by a decree, formerly of divorce *à mensâ et thoro*, and now of judicial separation, in case the husband refuses to supply his wife with the necessaries of life, which is a recognised form of cruelty entitling the wife to such a decree:" *ib.*

Divorce *à vinculo* could not be granted for such a cause, as that

Riddell, J.

1910

PRICE

v.

PRICE.

Riddell, J.

1910

PRICE

v.

PRICE.

required adultery in the offending husband; but, on a proper case being made out, a divorce *à mensâ et thoro* under the old practice would be adjudged, with alimony as an incident. But I can find no case in which such a decree has been awarded to a wife who had continued to occupy, with her husband, her husband's house.

I have in *Forster v. Forster* (1909), 14 O.W.R. 796, 1 O.W.N. 93, considered the law as to a decree for restitution of conjugal rights; and can find nothing in this case which would indicate that the plaintiff would, if in England, be entitled to such a decree.

And I can find no case, either in England or Ontario, in which a wife has been awarded alimony under such circumstances—and I shall not make a precedent.

In my view, the law, so long as a wife remains in her husband's house, enables her to enforce the marital obligation to supply her with clothing, only by a circuitous route, by pledging the credit of her husband for necessities: Schouler on Domestic Relations, sec. 61. "When a wife is living with her husband, if he gives her nothing but the shelter of his house, she would have a right to provide food and apparel for herself at his expense, and he would be bound to pay for them." Bramwell, L.J., in *Debenham v. Mellon* (1880), 5 Q.B.D. 394, at p. 398.

The action should be dismissed, with costs payable as provided in Con. Rule 1145; the dismissal, of course, to be without prejudice to any action other than for alimony.

---



[RIDDELL, J.]

GRILLS V. FARAH.

1910

June 16.

*Company—Unsatisfied Judgment against—Action against Shareholder—Unpaid Shares—Ontario Companies Act, 1907, secs. 68, 69—Counterclaim Against Company Sounding in Damages—Writ of Fi. Fa.—Return of Nulla Bona—Insufficiency—Defence—Set-off—Con. Rule 251—Dismissal of Action—Effect on Future Action.*

The plaintiff recovered judgment against a company, incorporated under the Ontario Companies Act, for \$674.08 damages and \$22.54 costs. He at once placed a writ of *fi. fa.* in the Sheriff's hands, and requested a return of *nulla bona*, as he wished to commence proceedings against the shareholders of the company. Thereupon the Sheriff, without inquiry as to available assets, indorsed on the writ a certificate that there were no goods and chattels in his bailiwick upon which he could levy as commanded by the writ. The writ was not returned, but remained in the Sheriff's possession. The plaintiff then began this action, to recover from the defendant, as one of the shareholders, the amount of the judgment. The defence was a simple denial. By counterclaim against the company the defendant set up that he sold the company certain property for \$2,468, and agreed to accept 2,468 shares of paid-up stock therefor; that he subscribed for 500 shares as part of the 2,468; that the company did not deliver the shares; that the shares had no market value; that, therefore, the company owed him \$2,468 as the purchase-price of the property; that the plaintiff and his father had not paid for their shares; that the plaintiff and the company were acting in collusion in the matter of the *fi. fa.* and direction to the Sheriff; and he claimed from the company (made defendants by counterclaim) the sum of \$2,468:—

*Held*, that the claim attempted to be set up in the counterclaim was not "relating to or connected with the original subject of the cause or matter," so as to come within the Ontario Judicature Act, sec. 57 (7); it was a claim sounding in damages against the company only; and the counterclaim was struck out.

Section 69 of the Ontario Companies Act, 1907, allows a set-off to be pleaded, but against the claim made in the action only, and not against any one other than the plaintiff.

*Held*, as to the plaintiff's claim in the action, that he had not proved himself within sec. 68 of the Companies Act, which provides that a shareholder shall not be liable to such an action "before an execution against the company has been returned unsatisfied in whole or in part."

History of the enactment and review of the authorities.

*Semble*, that, if this initial difficulty could have been got over, the plaintiff would have been entitled to recover; for the facts alleged in the counterclaim did not constitute a defence to the action; since the change in the Con. Rules made in 1888, under statutory authority (Con. Rule 373 of 1888, Con. Rule 251 of 1897), a defendant has not the right to set up as a defence by way of set-off a claim sounding in damages—he must set it up by way of counterclaim; and, the Companies Act, 1907, having been passed with the law in this condition, the shareholder, had the action been brought by the company, could not have pleaded by way of defence a set-off sounding in damages; but he might "set up" such a claim against the company if the company sued; and the Act says that he may plead by way of defence any set-off which he could set up against the company; there was no reason, therefore, why he could not plead this set-off by way of defence in the present action, although he would need to take another proceeding to set it up if the company had been plaintiff; but on the facts the defendant could not succeed.

*Semble*, also, that the dismissal of the action would not prevent another action being brought.

1910  
GRILLS  
v.  
FARAH.

ACTION to recover \$500, and counterclaim by the defendant for \$2,468, in the circumstances mentioned in the judgment.

June 13. The action and counterclaim came on for trial before RIDDELL, J., without a jury at North Bay.

*A. G. Slaght*, for the plaintiff.

*F. L. Smiley*, for the defendant.

*M. G. V. Gould*, for the National Mining and Development Company, defendants by counterclaim.

June 16. RIDDELL, J.:—The plaintiff on the 7th January, 1909, recovered a judgment against the National Mining and Development Company, a company incorporated under the Ontario Companies Act, for \$674.08 damages and \$22.54 costs. On the same day a writ of *fi. fa.* was, by the agent at North Bay of the plaintiff's solicitor, issued and given to the Sheriff at North Bay, with a letter saying: "Mr. W., of Haileybury, the plaintiff's solicitor, is desirous of having you make a return of *nulla bona*, as he wishes to commence proceedings against the shareholders of the defendant company. Please let me have this return to-morrow, if possible, with a memo: of fees." The company's head office was at New Liskeard, and it had been carrying on operations in the mining district. Thereupon, as was expected and intended, the Sheriff, without inquiry as to available assets, signed an indorsement on the writ: "I certify that there are no goods and chattels in my bailiwick that I can levy upon as I am commanded by said writ of *fi. fa.*" The writ was not returned, but remained and remains in the Sheriff's office, in the possession of the Sheriff.

On the 11th February, 1910, this action was begun, claiming \$500 from the defendant.

The defendant filed a defence and counterclaim, styling the counterclaim, "Between Kalie Farah, plaintiff, and The National Mining and Development Company, by way of counterclaim, defendants."

The defence was a simple denial; the counterclaim set up that Farah sold the company certain property for \$2,468, and agreed to accept 2,468 shares of paid-up stock therefor—that he subscribed for the 500 shares as part of the 2,468, that the company did not deliver the shares, that the shares have now no market value, and so the company owes him \$2,468 as the purchase-price of the property—

that the plaintiff, Grills, and his father, had not paid for their shares, and that Grills and the company were acting in collusion in the matter of the writ of *fi. fa.* and direction to the Sheriff—and then claimed by way of counterclaim from the company the said sum of \$2,468; and concluded by saying, “The defendant Kalie Farah submits that the action of the said . . . Grills against him should be dismissed with costs.”

The plaintiff replied specially, and the company put in a defence to the counterclaim upon the merits.

At the opening of the case at North Bay non-jury sittings, the company moved to strike out the counterclaim—it was made plain by statements of Farah’s counsel that his real claim against the company was for the non-delivery of the 2,468 shares at a certain time, at which time Farah contended they were worth 60 to 80 cents on the dollar—the company wrongfully retaining them until they had become worthless. I struck out the counterclaim, with costs as of a motion only.

We have recently in *Thompson v. Big Cities Realty and Agency Co.*, ante 394, considered the case of a counterclaim. In the present case it is quite clear, from the statements of counsel and otherwise, that the claim attempted to be set up in the counterclaim is not “relating to or connected with the original subject of the cause or matter,” so as to come within the Ontario Judicature Act, sec. 57 (7)—it is a claim sounding in damages against the company only. I could have got over the irregularity of claiming simply against the company and leaving out of the style of cause the name of the plaintiff in the action—but the facts are conclusive.

Farah appeals to the Ontario Companies Act of 1907, 7 Edw. VII. ch. 34, sec. 69—“Any shareholder may plead by way of defence . . . any set-off which he could set up against the company,” with certain exceptions. The nature of a set-off will be considered later; for the purpose of the disposition of the counterclaim it is sufficient to note that this section allows the set-off to be pleaded against the claim made in the action only, and not against any one other than the plaintiff. With that defence the company has nothing to do; it is between plaintiff and defendant only.

At the trial I expressed great doubt whether the plaintiff had proved himself within sec. 68 of the Ontario Companies Act of 1907, which provides that in actions of this kind the “shareholder . . .

Riddell, J.

1910

GRILLS

v.

FARAH.

Riddell, J.

1910

GRILLS

v.

FARAH.

shall not be liable to an action . . . before an execution against the company has been returned unsatisfied in whole or in part."

Further consideration has convinced me that my doubt was well founded.

The statutory provision for making a judgment against a company available against an unpaid shareholder is in lieu of the common law practice by way of *sci. fa.* Before the Legislature intervened, it was the law "wherever you seek to fix one party on a judgment given against another it must be done by *sci. fa.*:" *Cross v. Law* (1840), 6 M. & W. 217, at p. 223, per Lord Abinger, C.B. And, upon application for this writ, the question as to the previous attempts to recover from the company and the existence of assets seem to have been disposed of. See *per* Hagarty, C.J., in *Brice v. Munro* (1885), 12 A.R. 453, at p. 459.

Notwithstanding that the statute had, at least as early as the Joint Stock Companies General Clauses Consolidation Act (1861), 24 Vict. ch. 18, sec. 33, provided a remedy practically the same as the present statutory remedy, for long *sci. fa.* continued to be brought in our Courts. Either original action against the shareholder or *sci. fa.* was resorted to: *Gwatkin v. Harrison* (1875), 36 U.C.R. 478; *Page v. Austin* (1876), 26 C.P. 110. But the *sci. fa.* proceeding died out, and the more convenient method provided by the statute became universal.

The Courts had early to consider the meaning of the provision that the shareholder should not be liable before an execution against the company had been returned unsatisfied.

In *Moore v. Kirkland* (1856), 5 C.P. 452, a similar provision in the Railway Act was considered—14 & 15 Vict. ch. 51, sec. 19, afterwards C.S.C. ch. 66, sec. 80, and still in the Railway Act, R.S.C. 1906, ch. 37, sec. 98. Macaulay, C.J., says, p. 457: "The declaration must be taken to allege the return of an execution against the company unsatisfied; and, I think, it forms properly a matter for the jury, whether a return in form was such a return as the statute requires—namely, a return unsatisfied, not *pro formâ*, but after due diligence to realise the amount out of the effects of the company."

In *Jenkins v. Wilcock* (1862), 11 C.P. 505, Draper, C.J., giving the judgment of the Court, says, p. 508: "I agree the execution must be issued for the purpose of obtaining satisfaction if it can be



had—it is not to be a mere illusory formal proceeding, to give colour to proceedings against a shareholder.”

These cases are cited with approval in *Brice v. Munro*, 12 A.R. 453, at pp. 462, 463, 471; and, so far as I can find, the law never has been questioned.

In *Shaver v. Cotton* (1896), 23 A.R. 426, Burton, J.A., at p. 431, says: “. . . Shewing a return of *nulla bona* to a *fi. fa.* . . . is by no means conclusive, for it is consistent with such a return that it may have been made at the request of the plaintiff, and without any *bonâ fide* effort to look for property.” In the present case the so-called return was “made at the request of the plaintiff, and without any *bonâ fide* effort to look for property.”

I am not satisfied that there was no property exigible under the writ—but, even if such were the case, I do not think the plaintiff is advanced. “It may be that the company had no goods which were exigible under execution at the time the writ was placed in the Sheriff’s hands, but, if there were any, the Sheriff was prevented from seizing and selling them by the plaintiff himself:” *per* Burton, J.A., in *Shaver v. Cotton*, at p. 431. In that case the goods, if there were any, were prevented from getting into the hands of the Sheriff by the plaintiff obtaining an order for winding-up—in the present case the Sheriff never was intended to seize any goods, if such there were.

If the plaintiff could get over this initial difficulty, I think he should recover. There is no necessity for calls upon the stock having been made: *Moore v. Kirkland*, *ut supra*. Nor do the facts as alleged in the so-called counterclaim, so far as they are proved, afford a defence. Although I dismissed the company from the action as improperly and irregularly brought in, I allowed evidence to be given of any allegations contained in the counterclaim, by way of defence to the action.

The first statutes, *e.g.*, 24 Vict. ch. 18, sec. 33, 27 & 28 Vict. ch. 23, sec. 27, R.S.O. 1877, ch. 149, sec. 35, had contained no provision for set-off; but the Act of 1885, 48 Vict. ch. 33, sec. 3 (O.), has the still existing clause, “Any shareholder may plead, by way of defence in whole or in part, any set-off which he could set up against the company” (save as provided). This has come forward, and, as we have seen, is still law. But, while the statute put the shareholder in a better position in allowing him to plead as a defence any set-off he had against the company, it did not put him in the same position as though the company had been the party suing.

Riddell, J.

1910

GRILLS

v.

FARAH.

Riddell, J.

1910

GRILLS

v.

FARAH.

The distinction between a set-off and a counterclaim has become of little importance under our practice in most cases, but the distinction is sharp and has not been put an end to by the Judicature Act: *Chamberlain v. Chamberlin* (1886), 11 P.R. 501.

At the common law there was no such thing as a set-off—"if the plaintiff was indebted to the defendant in as much or even more than the defendant owed to him, yet he had no method of striking a balance: the only way of obtaining relief was by going into a Court of Equity." Tidd's Practice, 8th ed., p. 715. It would seem that the first legislation allowing a set-off of mutual demands was in cases of bankruptcy, 4 Anne ch. 17, sec. 1. "The natural sense of mankind was first shocked at this, in the case of bankrupts:" Lord Mansfield in *Green v. Farmer* (1768), 4 Burr. 2214, 2220, 2221. Then by 2 Geo. II. ch. 22, sec. 13, the general case of mutual debts between the plaintiff and defendant was provided for, and a set-off allowed of one debt against the other—this was made perpetual by 8 Geo. II. ch. 24, sec. 4, and somewhat extended. Our first Legislature introduced this rule into Upper Canada in 1794, and it has ever since formed part of our law.

As is pointed out in *Girardot v. Welton* (1900), 19 P.R. 162, at p. 165, our law went ultimately further than the English law, and allowed the defendant to recover his excess in the action itself—in England the set-off could only be used as a shield, not as a sword: *Stooke v. Taylor* (1880), 5 Q.B.D. 569. Both in England and in Ontario set-off was the substance of a plea—it was a defence—and was pleaded as a defence.

It was decided that under these statutes a claim for unliquidated damages could not be set off: Bullen & Leake, Precedents, 3rd ed., p. 679, and cases cited. The Ontario Judicature Act, 1881, made a change: Rule 127 provides: "A defendant in an action may set off, or set up by way of counterclaim, against the claims of the plaintiff, any right or claim whether such set-off or counterclaim sound in damages or not." This gave the defendant an option to set up the claim either by way of set-off (and consequently, *pro tanto* at least, as a defence), or as a counterclaim; and enlarged the class of claims which could be set off. This was the state of the law when the statute of 1885, 48 Vict. ch. 33, was passed: and consequently, I think, the Legislature intended the shareholder to have the right of setting off even claims sounding in damages. The change in the

Con. Rule made in 1888, under the authority of 50 Vict. ch. 8 (O.), Rule 373, "A defendant in an action may set up by way of counterclaim, against the claim of the plaintiff, any right or claim whether the same sound in damages or not," made another difference—see Con. Rule 251 of 1897. Now no longer has a defendant the right to set up as a defence by way of set-off a claim sounding in damages—he must set it up by way of counterclaim.

In my opinion, the change in the Con. Rule, having, as it has, the effect of a statute, has taken away the right formerly possessed by a defendant of pleading as a defence a claim sounding in damages. The Companies Act of 1907 having been passed with the law in this condition, I am of opinion that the shareholder, had the action been brought by the company, could not have pleaded by way of defence a set-off sounding in damages. But this is not conclusive—he might "set up" such a claim "against the company" if the company sued; and the Act says that he "may plead by way of defence . . . any set-off which he could set up against the company." I see no reason why he cannot plead this set-off by way of defence in the present action, although he would need to take another proceeding to set it up had the company been plaintiff. But, on the facts, the defendant cannot succeed (the 500 shares had nothing to do with the 2,468). There was no binding contract to give the defendant 2,468 or any paid-up shares—and, even if he had a right to receive any shares paid-up, he made no demand or request for them; and, in any event, I am not satisfied that any damage accrued to him.

But, for the reason first given, this action will be dismissed with costs. This dismissal will not prevent another action being brought, as in *Barber v. McCuaig* (1900), 31 O.R. 593.

Riddell, J.

1910

GRILLS

v.

FARAH.

[BOYD, C.]

1910

RE STOKES.

June 17.

*Will—Construction—Devise of Dwelling—Lands Enjoyed with—Addition of Buildings after Date of Will—Avoidance of Intestacy—Con. Rule 938—Scope of—Admission of Evidence to Shew Circumstances.*

The testator devised to his adopted daughter (subject to the life estate of his wife) "the dwelling on the south side of B. street in which we now reside, in the town of P., in the county of B." At the date of the will the testator and his wife lived in his house in B. street, which stood upon a lot having a barn at the rear. Before his death he added two rooms to the original house, and moved the barn to the front, and improved it into another habitable house. He was still, at his death, living in the original dwelling. There was nothing in the will to indicate an intention that the whole lot and whatever was thereon should not go with the dwelling. It was contended that there was an intestacy as to the parts of the lot occupied by the addition of the two rooms and the site of the removed barn:—

*Held*, that the devisee took the whole premises.

*In re Alexander*, [1910] W.N. 36, *In re Champion*, [1893] 1 Ch. 101, and *Governors of St. Thomas's Hospital v. Charing Cross R.W. Co.* (1861), 1 J. & H. 400, 404, followed.

*Held*, also, that the Court had jurisdiction, upon an originating notice under Con. Rule 938, to construe the will and to take such evidence as might assist to understand the situation at the date of the will and the date of the death.

MOTION by the executors of the will of James Henry Stokes, deceased, upon an originating notice under Con. Rule 938, for an order declaring the construction of the will, and particularly for the opinion, advice, and direction of the Court as to what estate the widow Mary Ann Stokes took under the will, and, if any part of the estate should be found not to be devised under the will, to whom it descended, and what land passed with the same.

The testator died on the 20th December, 1909. The will was dated the 5th October, 1907, and was as follows:—

"I revoke all former wills or other testamentary dispositions by me at any time heretofore made and declare this only to be and containing my last will and testament.

"I direct all my just debts, funeral and testamentary expenses, to be paid and satisfied by my executor and two executrices herein-after named as soon as conveniently may be after my decease.

"I give devise and bequeath all my real and personal estate, goods and chattels, and all other real and personal estate and effects whatsoever and wheresoever of which I may die possessed, in the following manner, that is to say: To Mrs. Ada Olson, wife of Olaf



Olson of Sandborn, in Redwood county, in the State of Minnesota, one of the United States of America, one thousand dollars to be paid as soon as convenient after my decease.

1910  
RE  
STOKES.

"To my beloved wife Mary Ann Stokes all my real estate wherever situated for her natural life. She to take full possession of it, and to collect all rents, and to pay taxes, and repairs, also all my household goods, and the balance of my estate, and all moneys of which I may die possessed for her own. After my wife's decease, I bequeath to Mrs. Annie Anderson, wife of John M. Anderson of 292 Palmerston avenue, Toronto, in the county of York, the dwelling on the south side of Banfield street in which we now reside, in the town of Paris, in the county of Brant.

"I bequeath to Miss Gertrude Anderson of 292 Palmerston avenue, Toronto, in the county of York, the two east dwellings of the row of four dwellings on the south side of Church street in the town of Paris, in the county of Brant.

"I bequeath to Miss Merilla Anderson, also of 292 Palmerston avenue, Toronto, in the county of York, the two west dwellings of the row of dwellings above named on the south side of Church street in the said town of Paris, and aforesaid county of Brant.

"And I nominate and appoint John M. Anderson . . . to be my executor and his wife Annie Anderson . . . and my beloved wife Mary Ann Stokes to be my executrices of this my last will and testament."

In an affidavit made by John M. Anderson he stated, *inter alia*, that the testator at the time the will was made lived in a house marked "1" on a plan exhibited, and that since his will was made he had built an addition (marked "2" on the plan) to the house, and that a tenant occupied a part of the house, and there was no partition wall between the part occupied by the tenant and that which was occupied by the testator, and the doors between the parts occupied by the tenant and the testator respectively were still open and had never been closed up, and the house was under one roof, except the part that was over the new addition, which was composed of two rooms and a hall, and all the property shewn on the plan was used in connection with the homestead, and another house on the lot made out of a barn, as shewn on the plan, had been rebuilt since the will was made.

1910  
RE  
STOKES.

June 16. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

*W. M. Charlton*, for the executors.

*Grayson Smith*, for Mary Ann Stokes and Annie Anderson.

*J. E. Jones*, for Julia Ayres, representing the next of kin.

June 17. BOYD, C.:—Rule 938 should be liberally construed so as to include any and every question which may arise in the administration of an estate and such as might be included under the usual administration order as to real or personal property: *Re Whitty* (1899), 30 O.R. 300. And specifically any question affecting the rights of persons claiming to be devisees or heirs-at-law (subdiv. a). The question here is, whether Mrs. Anderson is devisee of the whole of the lot on Banfield street, or whether there is an intestacy as to part of that lot. The interests also of the widow are concerned. She is life-tenant of the whole real property, but she may have additional rights if there is partial intestacy as to land. I think jurisdiction attaches under the Rule to construe this will and to take such evidence as may assist to understand the situation at the date of the will and the date of the death. The testator intends to deal with all his real and personal estate, and all has vested in his executors subject to the rights of beneficiaries and creditors, and they may properly, as trustees, ask that the will be construed by the Court in this summary way.

The doubt arises on the devise (subject to the life estate of the widow) to his adopted daughter, Mrs. Anderson, of "the dwelling on the south side of Banfield street in which we now reside, in the town of Paris, in the county of Brant."

At the date of the will the testator and wife lived in his house on that street, and the description would cover the dwelling and the land occupied therewith. That was in October, 1907. He died in December, 1909, and in the interval he added two rooms to the original house, and removed a barn which was on the rear of the lot to the front, and improved it into another habitable house. These structural changes do not, I think, change the area of the benefit intended by the testator in the property described and identified in the will. He was still, at his death, living in the dwelling on Banfield street, and there is no indication in the will that the addition of other structures should nullify the original testamentary

intention to give the whole of the place to the devisee. I should frustrate the will were I to hold that there was an intestacy as to the parts of the lot occupied by the addition of the two rooms and the site of the improved and removed barn.

I declare, therefore, against an intestacy, and am of opinion that the devisee takes the whole premises on Banfield street.

The cases cited by Mr. Smith, *In re Alexander*, [1910] W.N. 36, and *In re Champion*, [1893] 1 Ch. 101, cover both points argued. And as to the scope of the grant or devise of a dwelling or house, I would quote the language of Page Wood, V.-C., in *Governors of St. Thomas's Hospital v. Charing Cross R.W. Co.* (1861), 1 J. & H. 400, at p. 404: "It includes not only the curtilage, but also a garden attached to the house; *â fortiori*, therefore, any buildings forming part of or appertaining to the messuage would also be included."

Costs out of the estate.

Boyd, C.  
1910  
RE  
STOKES.

# [IN THE COURT OF APPEAL.]

## REX V. WILLIAMS.

*Criminal Law—Theft of Fowl—No Evidence of Value—Speedy Trial—Criminal Code, sec. 370—Conviction—Sentence—Excessive Term of Imprisonment—Discharge of Prisoner—Criminal Code, secs. 1016, 1018.*

C. A.  
1910  
June 20.

The prisoner, having elected speedy trial without a jury, was brought before a County Court Judge's Criminal Court, and pleaded guilty to each of three separate charges of theft, at different times, of turkeys and chickens belonging to different owners. The value of the stolen property was not stated in any of the cases. The prisoner was convicted and sentenced on each charge to three years' imprisonment, the terms to run concurrently:—  
*Held*, that there was no power to impose upon the prisoner the sentence of three years' imprisonment.

Reference to secs. 10, 370, 386, 582, 824, 825, 1051, and 1056 of the Criminal Code.

Upon the hearing of a reserved case, the Court of Appeal, instead of fixing a shorter period of imprisonment, or otherwise varying the sentence, directed that the prisoner should be discharged.

Reference to secs. 1016 and 1018 of the Criminal Code.

CASE reserved by the Judge of the County Court of the County of Lambton, before whom, in the County Court Judge's Criminal Court, the prisoner, having elected speedy trial without a jury, pleaded guilty to each of three charges of theft, at different times, of turkeys and chickens belonging to different owners. They were

C. A.  
1910  
REX  
v.  
WILLIAMS.

not included in one charge. The value of the stolen property was not stated in any of the cases. The prisoner was convicted and sentenced on each charge to three years' imprisonment—the terms to run concurrently.

The question reserved was, whether there was power to impose the sentence of three years' imprisonment.

May 11. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*J. B. Mackenzie*, for the prisoner, argued that the sentence was unauthorised; that there could be no conviction, since the value of the stolen property was not stated on the record. He referred to *Russell on Crimes*, 7th ed., vol. 2, p. 1116, and to *The Queen v. Shepherd* (1868), L.R. 1 C.C.R. 118, and *The King v. Petrie* (1784), 1 Leach 294, cited there, and also to *Regina v. Caswell* (1870), 20 C.P. 275. He also contended that it was wrong to add together a number of petty larcenies.

*J. R. Cartwright*, K.C., and *E. Bayly*, K.C., for the Crown, urged that the prisoner should have raised these objections before the magistrate; and referred to sec. 898 of the Criminal Code.

June 20. MEREDITH, J.A.:—The single point raised in this case is, in substance, whether the trial Court could rightly, in any manner, have imposed, upon the prisoner, the sentence of three years' imprisonment in the provincial penitentiary.

It seems plain to me that he could not; and that the prisoner ought to be discharged.

The trial took place under the provisions of the Criminal Code respecting the speedy trials of indictable offences.

The offences charged were such as are especially provided for in sec. 370 of the Code. Under that enactment, if the value of the property stolen exceeds \$20, the offence is an indictable one, and the maximum penalty a fine of \$50, over and above the value of the property stolen, or two years' imprisonment, or both; whilst, if the value do not exceed \$20, the offence is one punishable on summary conviction, and the maximum penalty a fine of \$20, over and above such value, or one month's imprisonment with hard labour; with an additional punishment on summary conviction when the accused has before been convicted under the provisions of this



section; and, under sec. 1056 of the Criminal Code, where an offender is convicted of more than one offence, the sentences passed may be directed to take effect one after another.

The prisoner was convicted, upon his plea of guilty, of three offences against the provisions of the section 370; it was, therefore, quite within the power of the trial Court to impose a sentence of three years' imprisonment, for instance one year for each offence the sentences to take effect one after the other, if the value of the property stolen exceeded \$20 in each case; there was no such power if it did not.

There was no allegation, no proof, nor any confession, that in any of the cases the value of such property exceeded such sum; the value was not, in any manner, mentioned; but, from the description of the goods, it seems to me to be very improbable that it could have in any of the cases exceeded that sum. It is, therefore, quite clear that, under that section, there was no power to impose the penalty which was inflicted and which the prisoner is now undergoing.

It was suggested that the prisoner might have been liable to prosecution and punishment at "common law," as well as under the provisions of sec. 370 of the Criminal Code; but how could that be?

The criminal law of England, as it existed on the 17th September, 1792, is the criminal law of this Province, but only in so far as it has not been repealed by any Act of the Parliament of the United Kingdom having force of law in this Province, or by any Act of the Parliament of the late Province of Upper Canada, or of the Province of Canada, or by the Criminal Code or any other Act of the Parliament of Canada; and, as altered, varied, modified, or affected by any such Act only, it remains the criminal law of this Province: the Criminal Code, sec. 10.

Section 370 of the Criminal Code is such an alteration and modification, and the penalties provided for in it take the place of those in force in England at the time mentioned; and so the prisoner is not subject to transportation or any other of the ancient modes of punishment.

The whole subject of larceny is fully covered by secs. 344 to 398—see especially sec. 386—which cannot be looked upon other than as a modification of the law of England upon the whole subject.

C. A.  
1910  
REX  
v.  
WILLIAMS.  
—  
Meredith, J.A.

C. A  
1910  
REX  
v.  
WILLIAMS.  
—  
Meredith, J.A.

Beside this, sec. 1051 of the Criminal Code provides that the punishment shall be that prescribed by the statute especially relating to the offence, that is, sec. 370 of the Code: and, as I have said, prosecution and trial were had under the provisions of that Code.

It is not a case in which this Court can pass the proper sentence: see secs. 1016 and 1018 (c) of the Criminal Code. Unless the value of the goods stolen exceeded \$20, the case ought to have been dealt with summarily.

The course which it seems to me this Court should take is to answer the question, whether there was power to impose the penalty, in the negative; and direct that the prisoner be discharged: see sec. 1018 (c).

MAGEE, J.A. (after stating the facts as above):—Under sec. 370 of the Criminal Code, R.S.C. 1906, ch. 146, such a theft is, if the value of the property stolen exceeds \$20, an indictable offence and punishable with a pecuniary penalty or two years' imprisonment, and, if the value does not exceed \$20, is an offence and punishable on summary conviction with a pecuniary penalty or one month's imprisonment with hard labour. No explanation is given why a sentence in excess of that mentioned in the section was imposed. From the number of fowl charged to have been stolen, it would seem probable that in no case did the value come up to \$20.

It may be taken as clear that, if the value in each case was less than \$20, there would be no right to add them together so as to make the amount over that sum, and so impose a greater punishment on that account which would not be warranted by the smaller value in each case. The matter has to be considered on each charge separately.

"The County Judge's Criminal Court," as it is called in the provincial statute R.S.O. 1897, ch. 57, is constituted "for the trial, out of sessions and without a jury, of any persons committed to gaol on a charge of being guilty of any offence for which such person may be tried at a Court of General Sessions of the Peace, and for which the person so committed consents to be tried out of sessions and without a jury." By the Criminal Code, 1906, secs. 824 and 825, it has power to try persons committed to gaol or bound over

to appear for trial for offences mentioned in sec. 582 as being within the jurisdiction of the General Sessions. Its authority thus applies to indictable offences.

The sentence of three years in the present cases could only be warranted if there were a right to indict for theft of fowl of less value than \$20, and if the value was so stated on the record. Such theft was indictable at common law. It is not necessary here to decide whether the right to proceed by indictment has been taken away by the provisions of sec. 370 or elsewhere in the Code. Even if such procedure now exist, the Court would have no right to assume that the property stolen was of less value than \$20, and that therefore it could impose a greater punishment than if the value exceeded that sum. In any view which is taken of the case, the Court had no right to impose the sentence which it did, and the prisoner is entitled to have some relief.

Under sec. 1018 of the Code, the Court, on the hearing of an appeal, may pass such sentence as ought to have been passed or make such other order as justice requires. In *The Queen v. Dupont* (1900), 4 Can. Crim. Cas. 566, the Quebec Court of Queen's Bench (appeal side), upon a reserved case, after a plea of guilty, reduced an illegal sentence to the maximum legal term of imprisonment: and see *The King v. Ettridge*, [1909] 2 K.B. 24. By the words "such sentence as ought to have been passed" I do not understand that we are bound to impose the maximum authorised, but such as it is considered the circumstances call for.

As already mentioned, it does not seem probable that the value of the stolen fowl exceeded \$20 in any one case. Even if the right of inflicting greater punishment upon indictment exists, it is proper to have regard to the limits imposed upon Justices of the Peace upon convictions in such cases, and this prisoner, if he had been summarily convicted, could only have had one month's imprisonment in each case or three months in all. Different sections of the Code provide for different punishments on indictment and summary conviction for the same offence (*e.g.*, secs. 82, 208, 291, 430, 435, 438-440, and 781). But, having in view the maximum punishment under sec. 370, even when the value is greater, I think the prisoner has been confined long enough, and that the order which justice requires is that he should be discharged.

The question reserved for the Court should, I think, be answered

C. A.  
1910  
REX  
v.  
WILLIAMS.  
—  
Magee, J. A.

C. A.  
1910  
REX  
v.  
WILLIAMS.

as follows, that the County Court Judge's Criminal Court had not jurisdiction, in the circumstances, to impose the sentences which it did.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

---

[MEREDITH, C.J.C.P.]

1910  
June 20.

CANADIAN RAILWAY ACCIDENT CO. V. WILLIAMS.

*Execution—Interests under "Oil Leases"—Goods or Lands.*

The interests of the defendants under certain "oil leases," in substantially the same form as the instrument the effect of which was considered in *McIntosh v. Leckie* (1906), 13 O.L.R. 54, were held, following the decision in that case, to be interests in land, and not liable to seizure under execution as goods.

MOTION by the defendants Williams and Aitkin for an injunction to restrain the plaintiffs and the Sheriff of the County of Kent from selling under the plaintiffs' execution the applicants' interests in certain "oil leases" as being goods liable to seizure under execution. The leases were made by the owners of certain lands in the county of Kent to one Michael Egan, who had executed a declaration that he held certain undivided interests in them in trust for the applicants.

April 21. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court.

*H. S. White*, for the applicants.

*J. M. Ferguson*, for the plaintiffs and the Sheriff.

June 20. MEREDITH, C.J.:—This application is the result of a motion to continue an injunction granted by the Local Judge at Chatham in an action by the respondents against J. R. Gemmell, the Sheriff of the County of Kent, restraining him from selling under an execution in his hands against the defendants in this action the interests of the defendants, who are plaintiffs in that action, in certain lands in the county of Kent, which the Sheriff had advertised for sale as being goods liable to seizure under the execution.

Upon the motion being opened, I pointed out that the proceeding



by action was taken contrary to the provisions of the Judicature Act, and that in any case the plaintiff in this action would be a necessary party to it, and was not made a party; whereupon it was agreed by counsel that the motion should be treated as a substantive motion in this action to restrain the Sheriff from selling the interests except as lands.

The interests which the Sheriff is proceeding to sell are the interests of the defendants Williams and Aitkin in what are called "oil leases," made by the owners of certain lands in the county of Kent to one Michael Egan, who has executed a declaration that he holds certain undivided interests in them in trust for these defendants.

These oil leases are in substantially the same form as the instrument the effect of which was considered by the Chancellor in *McIntosh v. Leckie* (1906), 13 O.L.R. 54, and the question for decision is whether they are saleable as goods under the execution.

I am of opinion that they are not.

The legal effect of the instrument with which the Chancellor had to deal, and therefore of the instruments under which Egan derived title, was held to be more than a license. "It confers," said the Chancellor, p. 57, "an exclusive right to conduct operations on the land in order to drill for and produce the subterranean oil or gas which may be there found during the specified period. It is a *profit à prendre*, an incorporeal right to be exercised in the land described: *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475, 483."

In *Duke of Sutherland v. Heathcote*, Lindley, L.J., said, of a right to work mines: "It is something more than a mere license: it is a *profit à prendre*, an incorporeal hereditament lying in grant. The distinction between a license and a *profit à prendre* was pointed out in *Wickham v. Hawker* (1840), 7 M. & W. 63, 78, a leading case on rights of sporting."

In *McLeod v. Lawson* (1906), 8 O.W.R. 213, the Chief Justice of Ontario quoted as authoritative (pp. 220, 221) the observations of Lindley, L.J., in *Duke of Sutherland v. Heathcote*, at p. 484, as to the nature of a *profit à prendre*.

In *Gowan v. Christie* (1873), L.R. 2 Sc. App. 273, Lord Cairns said (pp. 283-4) that a lease of mines is "not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or

Meredith, C.J.

1910

CANADIAN  
RAILWAY  
ACCIDENT  
Co.

v.

WILLIAMS.

Meredith, C.J.

1910

CANADIAN  
RAILWAY  
ACCIDENT  
CO.

v.

WILLIAMS.

reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil." And in *Coltness Iron Co. v. Black* (1881), 6 App. Cas. 315, Lord Blackburn quoted this passage from the speech of Lord Cairns, and spoke of it "as a perfectly accurate statement:" p. 335.

An order must, therefore, go directing the Sheriff not to sell the interests in question except as interests in land, and after compliance with the Rules as to sales of land under execution.

The plaintiffs must pay the costs of the application.

---

[DIVISIONAL COURT.]

1910

DAVIS V. SHAW.

Jan. 10.

D. C.

1910

June 20.

*Vendor and Purchaser—Contract for Sale of Land—Option—Consideration—Sale of another Parcel—Separate Contracts in one Writing—Right to Withdraw Offer before Acceptance—Notice—Knowledge of Sale to Stranger—Description of Land—"Vacant Lot."*

The plaintiff signed a written memorandum in these words: "I agree to purchase from J.S. the brick house on the W. road with        feet to the south of the dwelling, making a roadway to the back yard, that is, a line to the back fence where there is a jog and from that to the W. road, the price being \$2,850." On the same piece of paper there was a memorandum signed by the defendant: "I, J.S., agree to sell the above property for the above stated sum. I also promise to give the purchaser the option of purchasing the vacant lot to the south of this lot, for the sum of \$1,000, providing that this offer be accepted within one year from date. Dated at London, May 8th, 1908:"—

*Held*, on conflicting evidence, that the two writings were signed at the same time.

The agreement as regards the land first mentioned was implemented by a conveyance:

On the 12th November, 1908, the defendant conveyed a portion of the "vacant lot" to S., of which the plaintiff was made aware; but, nevertheless, the plaintiff gave the defendant formal notice, on the 11th March, 1909, of his acceptance of the offer to sell the vacant lot:—

*Held*, that the offer or option was not an integral part of the agreement for the sale of the land referred to in the first part of the memorandum, so as to supply a consideration sufficient to support the "promise" made in the latter part; but was a mere offer, which could be withdrawn before acceptance, without any formal notice to the plaintiff, and it was sufficient that the plaintiff had actual knowledge that the defendant had done an act inconsistent with the continuance of the offer, *i.e.*, selling part of the vacant lot to S.

*Held*, also, *per* BRITTON, J., that the description of the vacant lot was sufficient. Judgment of SUTHERLAND, J., decreeing specific performance of the agreement to sell the vacant lot, in so far as the same could still be performed by the defendant, reversed.

ACTION to compel specific performance of a contract. The facts are stated in the judgments.

November 8, 1909. The action was tried before SUTHERLAND, J., without a jury, at London.

*J. H. A. Beattie*, for the plaintiff.

*J. M. McEvoy*, for the defendant.

January 10, 1910. SUTHERLAND, J.:—In this action the plaintiff seeks to have an agreement in writing between him and the defendant, dated the 8th May, 1909, specifically performed.

The agreement is set out in full in paragraph 2 (a) of the amended statement of claim, and is as follows:—

"I agree to purchase from James Shaw the brick house on the Wortley road with \_\_\_\_\_ feet to the south of the dwelling, making a roadway to the back yard, that is, a line to the back fence where there is a jog and from that to the Wortley road, the price being \$2,850.

(Signed) "EVANS DAVIS."

"I, James Shaw, agree to sell the above property for the above stated sum. I also promise to give the purchaser the option of purchasing the vacant lot to the south of this lot for the sum of \$1,000, providing that this offer be accepted within one year from date. Dated at London, May 8th, 1908.

(Signed) "JAMES SHAW."

There is a conflict of evidence as to whether the offer of the plaintiff and the acceptance of the defendant were signed at the same time, or at different times. I find in favour of the plaintiff's contention that they were signed at the same time. This seems to be a case in which I should follow the principles applied in the case of *Oxford v. Provan* (1868), L.R. 2 P.C. 135, and to the following effect: "In a suit for specific performance of an agreement, vague in its language, a Court of Equity, having regard to the terms of such agreement, will consider the surrounding circumstances, and conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforce-

1910  
—  
DAVIS  
*v.*  
SHAW.

Sutherland, J.

1910

DAVIS

v.

SHAW.

ment." The parties to the agreement and the consideration are certain. The property in the minds of the parties and the subject-matter of the contract was capable of being made certain. After the execution of the agreement and in pursuance thereof, the defendant conveyed to the plaintiff, by deed dated the 21st May, 1908, the following lands and premises, namely:—

"All and singular those certain parcels or tracts of land and premises situate, lying, and being in the city of London, in the county of Middlesex, and Province of Ontario, being composed of parts of lots Nos. 18 and 19 east of the Wortley road, according to registered plans Nos. 269 and 270, described as follows:—

"Parcel No. 1: Commencing at the point in the easterly limit of the Wortley road, distant 37 feet 5 inches south-easterly from the north-west angle of said lot 19; thence easterly parallel to the north boundary of said lot 19 to a point distant 74 feet 6 inches westerly from the easterly boundary of said lot 19; thence southerly parallel to the easterly boundary of said lot 19, 29 feet 6 inches to the southerly boundary of said lot 19; thence westerly along said southerly boundary of said lot 19, 97 feet 9 inches to the easterly limit of the Wortley road, and thence north-westerly along the easterly limit of the Wortley road 31 feet more or less to the place of beginning.

"Parcel No. 2: Commencing in the north-west angle of said lot 18, thence easterly along the limit between lots Nos. 18 and 19 to a point distant 38 feet 6 inches westerly from the easterly boundary of said lot 18; thence southerly parallel to the said easterly boundary of said lot 18, 6 feet, thence westerly parallel to the said limit between lots Nos. 18 and 19, to the easterly limit of the Wortley road, and thence north-westerly along the easterly limit of the Wortley road 6 feet more or less to the place of beginning;" being the land referred to in the plaintiff's offer as understood by the parties and upon which was a brick house on the Wortley road therein mentioned. It was the only brick house on that road then owned by the defendant or his wife. The title to the portion of lot No. 19, particularly mentioned and described in the said deed, was apparently in the wife of the defendant, and she joined in the said conveyance as one of the grantors.

The defendant admits he was acting, so far as the portion of



lot No. 19 was concerned, as the agent of his wife. The title to that portion of lot No. 18, comprised in said deed, was, at the time, in the defendant, and his wife also joined in the said deed to bar her dower therein.

The plaintiff paid to the defendant the agreed purchase-money for the land comprised in said deed, namely, \$2,850; went into possession of the property, and expended moneys thereon. Lot No. 18 was situated to the south of lot No. 19, and the defendant was, at the date of the agreement, the owner thereof, with the exception of what had been previously sold and conveyed to one William Gorman. Lot 18 was, at the time of the agreement in question, vacant in the sense that no person was actually resident thereon. The plaintiff says that, at the time of the signing of the said agreement, it was represented to him that the lot was vacant, and it is so referred to in the agreement. The defendant at the trial sought to shew that part of the rear of the lot was covered by an old barn, which was, at the time, rented to a third party, and that this was inconsistent with the view that the land was vacant. It appears to me from the agreement itself, and the evidence at the trial, that the term "vacant lot" was intended by the parties to mean that portion of lot 18 owned by the defendant and lying south of the land described in the deed above mentioned. Before entering into the said agreement, the plaintiff had stated to the defendant, and the latter was aware of the fact, that the plaintiff had in mind to purchase the said vacant lot, with an idea of protecting the land comprised in the deed and the residence thereon from the possibility of undesirable buildings being erected subsequently on the said vacant lot, and because, also, of the possibility of a house being erected thereon by him for his son.

The defendant, by the terms of the said agreement, and as a part thereof, gave the plaintiff the option of purchasing the said vacant lot to the south for the sum of \$1,000, provided the offer were accepted within one year from the date of the agreement.

In or about the month of November, 1908, the plaintiff saw that preparations were being made, by an excavation therein and building material being placed thereon, to erect a building on the said "vacant lot." He found, on going to the spot, that one William Smith was the person who was proceeding to build. He

Sutherland, J.

1910

DAVIS

v.

SHAW.

Sutherland, J.

1910

DAVIS

v.

SHAW.

notified him of his existing option, and later shewed it to him. He also saw the defendant shortly afterwards and remonstrated with him, calling to his attention the fact that he held the option in question, and proposed to exercise it. Smith also saw the defendant, and the latter intimated to him that he did not remember signing a paper of that kind, and he also told the plaintiff, when he spoke to him, that he had forgotten about the option. The plaintiff, having intimated verbally to the defendant a number of times his acceptance of the said offer, finally, on or about the 11th March, 1909, formally did so in writing, by a letter bearing that date.

On the 12th November, 1908, the defendant conveyed a portion of lot No. 18, covered by the option and having a frontage of 21 feet on Wortley road, to the said William Smith, for a named consideration of \$500, which deed was registered in the registry office for the city of London on the 13th November, 1908. This was before the said Smith had learned of the option.

On the property described in such last-mentioned deed the defendant Smith had, before the commencement of the action, completed the erection of a plumbing-shop.

In view of the acts of part performance by the parties to the said agreement and of the exercise of the option by the plaintiff within the time stipulated, I think he is entitled to succeed in this action. If the agreement were vague in its terms, the parties thereto apparently understood what they were contracting about, and, subsequently, by the deed first above mentioned, made it clear and definite what property was the subject of the contract in so far as the offer was concerned. It was this property which was meant by the defendant when, in his acceptance of the plaintiff's proposal, he agreed "to sell the above property for the above stated price." But, in his acceptance, he also promised "to give the purchaser the option of purchasing the vacant lot to the south of this lot for the sum of \$1,000, providing that this offer be accepted within one year from date." At the time he made the deed to the plaintiff, he owned all of lot 18 south of the land comprised in the said deed, with the exception of the portion sold, as previously mentioned, to one William Gorman. This was the "vacant lot" referred to in the acceptance. During the pendency of the option he has made it impossible, by his conveyance to the said Smith

of the 21 feet above mentioned, now to convey to the plaintiff the whole of the vacant lot, which was the subject of the contract between them.

There should be judgment for the plaintiff for specific performance of the agreement in question, in so far as the same can now be performed by the defendant, that is to say, to the extent of obtaining from the defendant a conveyance (free of dower) of all of lot 18 owned by him at the time the contract was entered into, except those portions comprised in the deeds to the plaintiff and Smith, already referred to. For this the plaintiff should pay him the additional sum of \$1,000, mentioned in the option, less the \$500 already paid by Smith to the defendant for the 21 feet, or such other amount as the parties can agree upon, if they can agree, as representing the value of the land conveyed to the said Smith. In case the parties cannot agree upon such value, there will be a reference to the Master at London to ascertain its value, and the same is to be deducted from the \$1,000. The plaintiff will have the costs of the action and also of such reference, if the same should be necessary.

Sutherland, J.

1910

DAVIS  
v.  
SHAW.

The defendant appealed from the judgment of SUTHERLAND, J.

May 26. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*H. E. Rose*, K.C., for the defendant. There was a conflict of evidence at the trial as to whether the offer and the acceptance were signed at the same time or not; the learned trial Judge has found, in favour of the plaintiff, that they were signed at the same time, which finding I cannot dispute here. It is submitted, however, that the option given by the defendant to the plaintiff of purchasing the vacant lot for \$1,000 was put an end to by the defendant's action in selling a part of the lot to Smith before the plaintiff accepted the option, which was not until after he had found Smith in possession of the part purchased by him: *Dickinson v. Dodds* (1876), 2 Ch. D. 463. [RIDDELL, J., referred to *Savereux v. Tourangeau* (1908), 16 O.L.R. 600.] The option in the case at bar was not under seal. The option in respect of the vacant lot was not connected with the agreement for the sale of the house property, and the consideration for the latter sale would not supply the lack of consideration for the option. The description

D. C.  
1910

DAVIS  
v.  
SHAW.

of the vacant lot is too vague to support a suit for specific performance, and the trial Judge's finding on this point cannot do away with the effect of the Statute of Frauds.

*I. F. Hellmuth*, K.C., and *J. H. A. Beattie*, for the plaintiff. The agreement is within the Statute of Frauds, as in such a case parol evidence is admissible to shew what was the subject-matter of the contract: *Plant v. Bourne*, [1897] 2 Ch. 281; Dart on Vendors and Purchasers, 7th ed., p. 238, and cases there referred to; *Horsey v. Graham* (1869), L.R. 5 C.P. 9. In this case there is in reality one agreement and not two independent agreements in question. See Mr. C. B. Labatt's article on the Law of Options in 36 C.L.J. (1900) at p. 529, and the cases there cited, which are principally American. They also referred to Fry on Specific Performance, 3rd ed., pp. 387-389; *Soames v. Edge* (1860), Johnson's Rep. 669. The defendant by his own default has prevented specific performance of the whole agreement, and, if the plaintiff waives his rights as to the part disposed of, he can get specific performance of the balance.

*Rose*, in reply, argued that the cases cited from Mr. Labatt's article referred to options to purchase contained in leases, which stood on a different footing, and are not applicable to the case at bar. He referred to *Cleaver v. North of Scotland Canadian Mortgage Co.* (1880), 27 Gr. 508, at p. 514, and to the discussion of the earlier cases in *Plant v. Bourne*, *supra*.

June 20. FALCONBRIDGE, C.J.:—An appeal from the judgment of Sutherland, J., wherein the documents and facts are fully set forth.

Regarding the latter part of the memorandum signed by the defendant as a mere offer or option, it is quite clear that it might be withdrawn before acceptance, without any formal notice to the plaintiff, and that it is sufficient that the plaintiff had actual knowledge that the defendant had done an act inconsistent with the continuance of the offer, *i.e.*, selling part of the "vacant lot" to Smith: *Dickinson v. Dodds*, 2 Ch. D. 463, referred to in *Savereux v. Tourangeau*, 16 O.L.R. 600, at p. 610.

But it is contended that the offer is an integral part of the agreement for the sale of the land and premises referred to in the first part of the memorandum, so as to supply a consideration sufficient to support the "promise" made in the latter part.



I am unable to accede to this view. The transaction relating to the brick house and premises was a matter by itself. It was carried out by the payment of the purchase money and delivery and registration of the conveyance.

I cannot consider the option granted to have been a part of the other contract in such a manner as to justify our regarding the consideration of the latter as supporting the option.

No Canadian or English authority was cited on the point.

I have looked at all the cases in the United States Courts (except one in 27 Indiana, that volume not being on the shelf) referred to by the learned author of the article in 36 C.L.J. at p. 529, note (g). They are one and all cases of options to purchase contained in leases—it being held that the rent reserved in a lease is a sufficient consideration for an agreement by the landlord therein contained to convey the land to the tenant upon the expiration of the term and upon payment of an agreed purchase-price.

I think these are all cases of covenants under seal, but at any rate they have no application to the point now under consideration.

In my opinion, the judgment of the learned trial Judge must be set aside and judgment entered for the defendant with costs of the appeal only. The action will stand dismissed without costs.

BRITTON, J.:—It is well settled that the mere giving another an option, or the refusal, of his property for a certain time is not founded on, nor does it furnish sufficient consideration to uphold, the promise or agreement.

Here it is alleged that there is more; that there are mutual promises. In the case of mutual promises, where made, one may furnish a sufficient consideration to support the other. They must be concurrent. They must become obligatory at the same time, must be referable to one agreement, although in reference to two distinct things.

If one agreement, although evidenced by two separate writings, in reference to what is really the same transaction, I see no reason why one may not supply the consideration for the other.

There is no doubt or difficulty in applying the law, if this one

D. C.

1910

DAVIS

v.

SHAW.

Falconbridge,  
C.J.

D. C.

1910

DAVIS

v.

SHAW.

Britton, J.

paper, in two parts, is to be considered as if relating to two distinct matters, having no connection one with the other.

If Shaw's offer may be styled an unilateral contract without consideration, it may, of course, be rescinded or cancelled at any time before acceptance. No authority need be cited for that.

Even in case of an option in writing, for valuable consideration, for a certain time, a verbal extension without consideration is a *nudum pactum*, and cannot be enforced.

My difficulty in this case is in not being able to treat the document as one transaction constituting an agreement on the part of the defendant not only to sell the brick house and one parcel of land for \$2,850, but with that sale to give the option to the plaintiff to purchase at any time within twelve months the other parcel of land for \$1,000.

Upon the argument I thought that possibly the true nature of the agreement could be better ascertained by reversing the order of the respective promises. Suppose it was as follows:—

"I, James Shaw, agree to sell the brick house on the Wortley road, with                      feet to the south of the dwelling, making a road, etc., the price being \$2,850. I also promise to give the purchaser the option of purchasing the vacant lot to the south for \$1,000, provided that this offer be accepted within one year from date.

"Dated May 8, 1908.

(Sgd.) "JAMES SHAW."

"I agree to purchase from James Shaw the house as described, the price being \$2,850.

(Sgd.) "E. DAVIS."

Can consideration be found in an agreement so worded? It is difficult to see how. I think there is no material difference between one so framed and the one relied upon by the plaintiff.

There seems nothing in the writing itself from which it can be inferred that the plaintiff would not have purchased the brick house without the option as to the vacant lot.

Each part of the agreement seems absolutely complete in itself. Neither seems to depend upon the other. The plaintiff says, "I agree to purchase from James Shaw the brick house, . . . the price being \$2,850." The defendant says, "I agree to sell the above property for the above stated sum." That is all, com-

plete in itself. Then, upon the same paper, but as something additional, and not connected, the defendant promised to give to the purchaser the option of purchasing the vacant lot for \$1,000, "providing that this offer be accepted within one year from date." That, of course, is a clear-cut option, but, unfortunately, it lacks consideration to support it. Before acceptance the defendant rescinded the offer to sell.

The defendant says he forgot that he had given this option. He apparently did not think the plaintiff intended to accept or that the plaintiff cared much about it. In that he was mistaken, as the plaintiff did care. The defendant is entitled to take the objection, as he has taken it, that the promise is of no value for want of consideration. I cannot find consideration in the document itself, nor can I find in the evidence that the plaintiff only purchased the brick house on consideration that the defendant would give the option mentioned. The matter was in the plaintiff's mind, but it was no part of the real agreement between the parties. The option was an independent promise, not under seal, that happened to be upon the same paper as another distinct agreement, in reference to another property.

In coming to this conclusion I agree with the learned trial Judge that the paper was signed by both parties on the same day. There is no other point in this case than the want of consideration. It makes no difference that the defendant did not own all of the first parcel. He did own part of it. He was in a position to sell, and the sale was in fact carried out: see *Horsey v. Graham*, L.R. 5 C.P. 9. The defendant did own the parcel now in question.

Objection was taken that there was something vague or insufficient about the description of this "vacant lot to the south of this lot." There is sufficient description to identify the lot. Apart from oral evidence, the contract itself makes sufficiently plain to the defendant and to the plaintiff the property intended.

In my opinion, the appeal should be allowed, but, in view of the defendant's own evidence, I would allow the appeal with costs and dismiss the action without costs.

RIDDELL, J.:—I agree in the result.

D. C.  
1910  
DAVIS  
v.  
SHAW.  
Britton, J.

[MEREDITH, C.J.C.P.]

STEPHENS V. RIDDELL.

1910

June 21.

*Company—Assignment of Amount Due by Subscriber for Shares—Security—Validity—Action by Assignee—Defence—Misrepresentations—Winding-up—Contributory—Approbation of Assignment—Subsequent Reprobation.*

The plaintiff, claiming under an assignment from an incorporated company, sued to recover moneys alleged to be due by the defendant in respect of shares of the capital stock of the company for which the defendant was a subscriber. The assignment was made to the plaintiff as security only for money lent. An order was made, under the Winding-up Act of Canada, for the winding-up of the company, before any steps were taken by the defendant to repudiate the shares, on the ground of misrepresentations alleged to have been made in order to induce him to subscribe for them, or on any other ground:—

*Held*, that, even if the defendant had made out a case which would, before the commencement of the winding-up, have entitled him to rescission, it would have been no answer to an application by the liquidator to place him on the list of contributories; and he was precluded in the same way from setting it up as an answer to the plaintiff's claim.

In the winding-up the liquidator sought to have the defendant placed on the list of contributories in respect of the shares in question, and the defendant succeeded in having his name removed from the list, on the ground that the unpaid calls had been assigned to the plaintiff:—

*Held*, that the defendant, having escaped from liability as a contributory by establishing the assignment under which the plaintiff claimed, could not now attack the validity of the assignment, either on the ground of misrepresentations or on the ground that the directors had no authority to borrow; he could not approbate and reprobate.

THE action was brought by the plaintiff, claiming under an assignment dated the 16th July, 1907, made by Shortells Limited to him, to recover \$1,000 alleged to be due by the defendant in respect of twenty shares of the capital stock of that company, for which the defendant was a subscriber, and of which he appeared on the books of the company as the registered owner.

May 30. The action was tried before MEREDITH, C.J.C.P., without a jury, at Toronto.

*F. W. Carey*, for the plaintiff.

*I. F. Hellmuth*, K.C., for the defendant.

June 21. MEREDITH, C.J.:—Two grounds are relied on by the defendant as defences to the action:—

1. That he was induced to subscribe for the shares by the fraudulent misrepresentations of the agent of the company who obtained his subscription for them.

2. That, as the fact is, the assignment to the plaintiff was a security only for \$1,000, which the company had borrowed from



him, and that the directors had no authority to borrow, and the assignment is, therefore, invalid.

Neither of these grounds is, in my opinion, tenable.

An order was made for the winding-up of the company under the Winding-up Act of Canada before any steps were taken by the defendant to repudiate the shares in question, on the ground of the misrepresentations alleged to have been made in order to induce him to subscribe for them, or on any other ground, and, even if he had made out a case which would, before the commencement of the winding-up, have entitled him to rescission, as to which I express no opinion, it is not open to him to claim that relief now.

If he would have had no answer, on the ground I am considering, to an application by the liquidator to place him on the list of contributories—and it is clear that he would not—I see no reason why he should not be precluded in the same way from setting it up as an answer to the plaintiff's claim, for the effect of his succeeding—the unpaid calls being held by the plaintiff as security only for the \$1,000 lent by him to the company—would be that the plaintiff's claim would be unsecured, and he would be entitled to rank with the other creditors on the assets in the liquidation, and so the fund which, by the winding-up order, became available for the payment of the creditors, would be depleted to the extent of the amount of the unpaid calls.

If this be not an answer to the objection, there is another answer, not only to it but to the defence based on the alleged invalidity of the assignment under which the plaintiff claims, which is fatal.

The liquidator sought in the winding-up to have the defendant placed on the list of contributories in respect of the shares in question, and the defendant succeeded in having his name removed from the list, on the ground that the unpaid calls had been assigned to the plaintiff—in other words by establishing the assignment under which the plaintiff claims.

Having escaped from liability as a contributory on that ground, it is not now open to him to attack the validity of the assignment. As was said by Duff, J., in *Lovitt v. The King* (1910), 43 S.C.R. 106, 140, "There is a doctrine of the law that one may not approbate and reprobate, play fast and loose, gain an advantage by assuming one position and escape the correlative burden by assuming another and inconsistent position."

Meredith, C.J.

1910

STEPHENS

v.

RIDDELL.

Meredith, C.J.

1910

STEPHENS

v.

RIDDELL.

This principle was applied by the Court of Appeal in *Roé v. Mutual Loan Fund Limited* (1887), 19 Q.B.D. 347, and it was held that the plaintiff, who had become bankrupt, having in the bankruptcy proceedings treated a bill of sale, the validity of which he was attacking in his action, as valid, and obtained thereby an advantage to himself, could not afterwards allege that the bill of sale was invalid so as to entitle him to recover in the action. Lord Esher, in stating his opinion, quoted with approval what was said by Honyman, J., in *Smith v. Baker* (1873), L.R. 8 C.P. 350, 357, that a man "cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."

The principle was also applied in *Gandy v. Gandy* (1885), 30 Ch.D. 57; and is applicable in the circumstances of the case at bar.

The plaintiff is, therefore, entitled to judgment for \$1,000 and interest thereon from the 1st June, 1907, with costs.

---

[DIVISIONAL COURT.]

D. C.

1910

June 27.

STOW v. CURRIE.

*Contract—Offer to Sell Mining Claim—Acceptance—Incomplete Contract—Terms—Uncertainty as to Price—References to Formal Contract to be Prepared.*

The defendants signed an offer in writing to sell to the plaintiff a mining claim, described, on the following terms: "10,000 in cash to be paid on the execution of a formal agreement; \$30,000 on the 1st day of October, 1908," and other sums on later dates; "and the delivery to ourselves or our nominees of 75,000 shares of fully paid non-assessable stock in a company to be organised on the property above mentioned . . ." The plaintiff accepted the offer, by writing signed by him, in these words: "I hereby accept the above offer and undertake to complete the purchase and make the payments as above stated when formal documents signed:"—

*Held*, that, while neither the offer nor the acceptance could be said to be subject to the condition that a formal contract was to be prepared, yet, upon the construction of the document—the price to be paid being uncertain by reason of the indefiniteness as to the capital stock of the company, the value of the shares, etc., and references being made to a formal agreement to be signed—it must be taken that the parties intended, not merely that the terms agreed upon should be put into form, but that they should be subject to a new agreement the terms of which were not expressed in detail; and therefore the offer and acceptance, without more, did not constitute a contract for the sale of the mining claim.

*Winn v. Bull* (1877), 7 Ch.D. 29, *Chinnock v. Marchioness of Ely* (1865), 4 De G.J. & S. 638, and *Rossiter v. Miller* (1878), 3 App. Cas. 1124, followed. Judgment of LATCHFORD, J., affirmed.

APPEAL by the plaintiff from the judgment of LATCHFORD, J., of the 24th November, 1909, dismissing the action, after trial before him, without a jury, at Toronto.

The following statement of the facts is taken from the judgment of CLUTE, J.:—

On the 11th July, 1908, the defendants Currie and Otisse gave the following option to the plaintiff:—

“We offer to sell the mining claim being known as ‘E.B. 21,’ in the township of Mickle, Montreal River mining division, in the district of Nipissing, Ontario, to Mr. E. Kenyon Stow, on the following terms: \$10,000 in cash to be paid on the execution of a formal agreement; \$30,000 on the 1st day of October, 1908; \$30,000 on the 1st day of January, 1909; \$30,000 on the 1st day of April, 1909; \$30,000 on the 1st day of July, 1909; and \$20,000 on the 1st day of October, 1909; and the delivery to ourselves or our nominees of 75,000 shares of fully paid non-assessable stock in a company to be organised on the property above mentioned, such stock to be delivered immediately after the formation of the company.

“This offer is given subject to the option at present existing to Mr. J. Carling Kelly, dated the 19th day of May, 1908, and subject also that acceptance be made on or before Monday the 13th day of July inst., at six o’clock p.m.

“Dated at Toronto this 11th day of July, A.D. 1908.

(Sgd.) “W. F. CURRIE.

“SAM’L. OTISSE.”

This option was accepted in the following terms:—

“I hereby accept the above offer and undertake to complete the purchase and make the payments as above stated when formal documents signed.

(Sgd.) “E. KENYON STOW.”

On the 18th September, 1908, the defendants Currie and Otisse transferred the said mining claims to the defendants Gzowski, Warren, and Loring, who subsequently transferred the same to the defendants the Otisse Mining Company Limited.

The plaintiff charges that these various transfers were made in fraud of the plaintiff, and with the knowledge of all the defendants, and asks a declaration that the transfers may be set aside, and to have it declared that the plaintiff is entitled to the same

D. C.

1910

STOW

v.

CURRIE.

D. C.  
1910  
STOW  
v.  
CURRIE.

under the said option and acceptance of the 11th July, 1908, and for an order directing the defendant company to transfer the same to the plaintiff.

The plaintiff further claims damages against all the defendants for fraud and conspiracy, and against the defendants Currie and Otisse damages for breach of contract and agreement to convey, and other relief.

The defendants Currie and Otisse plead that the negotiations of July, 1908, did not form a contract, and, if a contract was made thereby, it was conditional on a formal agreement being executed, and time was impliedly made the essence of the same; that no formal agreement was ever executed; and they say that they never became liable to transfer the said mining lands to the plaintiff.

There are other defences to the action, which it is not necessary at present more particularly to refer to, from what took place at the trial.

At the trial it was decided, after a good deal of argument, that the preliminary question, of the validity of the contract, should be first disposed of, and, by the ruling of the Court, the evidence was limited, or intended to be limited, to that question.

April 25 and 26. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

*G. H. Watson*, K.C. (*W. M. Douglas*, K.C., and *T. P. Galt*, K.C., with him), for the plaintiff. The trial Judge should not have confined the scope of the inquiry to the question whether or not the plaintiff had made out a contract which was on its face valid and sufficient, and should have allowed the plaintiff to go into the other issues raised by the pleadings, such as that the defendants were liable in damages for conspiracy to defeat the plaintiff's claim. The fact that the defendants Currie and Otisse brought an action against the plaintiff to enforce performance of the contract shews that they treated it at that time as valid and subsisting, and that they had waived any right to treat it as forfeited by reason of the non-payment of the \$10,000: *Michael v. Hart*, [1902] 1 K.B. 482, *per Collins*, M.R., at p. 490. The defendants having made their election to waive the alleged default, they are bound by that election, which, once made, is final.



Coming now to the terms of the contract, it is submitted that all its material terms are sufficiently clear, and that the reference to the subsequent "execution of a formal agreement" in no way invalidates the original agreement. The defendants cannot argue that the option and acceptance are void because the amount of capital of the company to be organised in connection with the property is not stated, as on the 24th July they tendered to the plaintiff a formal transfer in the same terms: *Crawford v. Lawson Mine Limited* (1908), 12 O.W.R. 454, at p. 463. The terms of the contract are set out with reasonable certainty considering the circumstances: Fry on Specific Performance, 4th ed., p. 164; *Marsh v. Milligan* (1857), 3 Jur. N.S. 979; *Great Northern R.W. Co. v. Manchester Sheffield and Lincolnshire R.W. Co.* (1851), 5 DeG. & S. 138.

*W. M. Douglas*, K.C., followed on the same side. The only objection that can be raised to the validity of the contract is the stipulation as to the 75,000 shares, but the parties to an agreement can stipulate for any consideration they choose, and the Courts will not inquire into its adequacy. It does not matter whether the shares have any value or not; the defendants are bound by their contract to accept them. If there was any other bargain with regard to these shares than what we assert, that is a matter to be shewn by the other side. All the defendants wanted, in addition to the cash payment, was an interest in the company to be formed by the plaintiff, who, as they realised, would capitalise the property in such a way as to make the most out of it. In *Ashcroft v. Morrin* (1842), 4 M. & G. 450, a contract to sell goods "on moderate terms" was held good under the Statute of Frauds. In *Lindley on Companies*, 6th ed., p. 545, it is stated that "persons not unfrequently agree to take shares in companies the capital of which is not defined;" and reference is made to *Norman v. Mitchell* (1854), 5 DeG. M. & G. 648, and *Nixon v. Brownlow* (1857), 2 H. & N. 455. The position is similar to that of a grant of a right of way, which the grantee is permitted to define if the grantor fails to do so. Reference was also made to the following cases and authorities: *Browne on the Statute of Frauds*, 4th ed., sec. 378; *Midland Great Western R.W. Co. v. Gordon* (1847), 16 M. & W. 804, 808; *Cork and Youghal R.W. Co. v. Paterson* (1856), 18 C.B. 414, especially at pp. 451, 452; *Dart on Vendors and*

D. C.  
1910  
Stow  
v.  
CURRIE.

D. C.  
1910  
Stow  
v.  
Currie.

Purchasers, 7th ed., pp. 241, 242; Gale on Easements, 8th ed., p. 182.

*I. F. Hellmuth*, K.C., and *Eric N. Armour*, for the defendants Warren, Gzowski, and Loring. The affidavit of the defendant Currie made in another suit is not evidence against these defendants. The plaintiff has submitted no evidence against them, and as against them the action should be dismissed. A number of important questions were left unsettled by the offer, and would have to be settled by the "formal agreement" therein referred to, as, for example, the right to mine on the property, the disposal of ore, questions as to interest, possession, vendor's lien, etc. There was no evidence that the plaintiff was to direct the capitalisation of the company. They referred to *North Eastern R.W. Co. v. Hastings*, [1900] A.C. 260.

*G. F. Shepley*, K.C., and *R. S. Robertson*, for the defendants Currie and Otisse. The simple question before the Court is, whether or not the option and acceptance constitute such a contract as the plaintiff can enforce. It is submitted that the parties contemplated the execution of a further agreement, and that neither party was to be bound until such an agreement was executed. Reference was made to the following decisions as shewing the distinction between the cases in which agreements containing a provision as to a further agreement have been held binding and not binding respectively, under which it was argued that the plaintiff's contention must fail: *Winn v. Bull* (1877), 7 Ch. D. 29; *Lloyd v. Nowell*, [1895] 2 Ch. 744; *Brien v. Swainson* (1877), 1 L.R. Ir. 135.

*F. Arnoldi*, K.C., and *D. D. Grierson*, for the defendants the Otisse Mining Co. These defendants are not affected by any questions arising out of the suit brought by the defendant Currie against the plaintiff, and there was no case against these defendants at the time they acquired their title. The plaintiff cannot assert his rights in a way inconsistent with the position formerly taken by him: *Marshall v. Berridge* (1881), 19 Ch. D. 233. The alleged contract is not sufficiently certain in material points, such as the price to be paid, the powers of the company to be formed, etc. They referred to *Douglas v. Baynes*, [1908] A.C. 477; *Downs v. Collins* (1848), 6 Hare 418, at p. 436; *Pearce v. Watts* (1875), L.R. 20 Eq. 492; *Savill Brothers Limited v. Bethell*, [1902] 2 Ch.

523; *Chinnock v. Marchioness of Ely* (1865), 4 DeG. J. & S. 638, at p. 646; *Ridgway v. Wharton* (1857), 6 H.L.C. 238, at pp. 264, 268, 305, 306, cited by Lord Blackburn in *Rossiter v. Miller* (1878), 3 App. Cas. 1124, at p. 1151; *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311; *Clark v. Robinson* (1903), 51 W.R. 443; *Watson v. McAllum* (1902), 87 L.T.R. 547.

*Douglas*, in reply, referred to *Robinson v. Page* (1826), 3 Russ. 114; Norton on Deeds, ed. of 1906, pp. 45, 46, 82, 84, 85, 89; *Zimble v. Abrahams*, [1903] 1 K.B. 577; *Devine v. Griffin* (1854), 4 Gr. 603; *Rossiter v. Miller*, *supra*, at pp. 1138, 1139, 1143, 1152; *Brogden v. Metropolitan R.W. Co.* (1877), 2 App. Cas. 666, at p. 672; *Oxford v. Provand* (1868), L.R. 2 P.C. 135, at pp. 153, 155; *North v. Percival*, [1898] 2 Ch. 128, at p. 132; *Lewis v. Brass* (1877), 3 Q.B.D. 667, at p. 671. Where a reference is made in an agreement to the execution of a subsequent formal agreement, without any provision as to the addition of further terms, this simply means that the formal agreement is to be on the lines of the original agreement, but is to be put "into a more formal and professional shape:" see the remarks of Lord Hatherley in *Rossiter v. Miller*, *supra*, at pp. 1143, 1144.

June 27. MEREDITH, C.J.:—It is unnecessary, in my view, to consider the question so much debated on the argument, as to the scope of the inquiry which the learned Judge decided to make before the trial of the other issues was entered upon, for, in my opinion, upon the question raised by Mr. Shepley at the trial, and which was certainly within the scope of the inquiry, the appellant's case failed.

That question was, whether or not there was a contract between the respondents Currie and Otisse and the appellant for the sale by them to him of the mining property in question; in other words, whether there was such a contract as the appellant sets up in his pleadings.

What was said by Jessel, M.R., in *Winn v. Bull*, 7 Ch. D. 29, at p. 32, I take to be an accurate statement of the law. He there says: "It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When

D. C.  
1910  
STOW  
v.  
CURRIE.

D. C.

1910

STOW

v.

CURRIE.

Meredith, C.J.

it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."

To the same effect is what was said by Lord Westbury in *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638, at pp. 645-6: "I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of . . . which establish, that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorised, there exist all the materials, which this Court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

In *Rossiter v. Miller*, 3 App. Cas. 1124, Lord Cairns said he was "willing to accept every word" of this statement of the law by Lord Westbury, but was of opinion that in the case with which he was dealing there was "a clear offer and a clear acceptance" and "no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made:" p. 1139. In the same case Lord Hatherley said (p. 1143): "If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between



the parties, merely because that letter may say, We will have this agreement put into due form by a solicitor."

What is relied upon by the appellant as the agreement which he sets up is in the form of an offer by the respondents Currie and Otisse to sell to him and an acceptance of the offer by him, both of them in writing.

[The Chief Justice then set out the offer and the acceptance, as above, and proceeded:]

I am inclined to think that neither the offer nor the acceptance can be said, in the language of the Master of the Rolls, to be "expressed to be subject to a formal contract being prepared," which I take to mean, is expressed to be subject to the condition that a formal contract is to be prepared; and that the question in the case at bar is one of construction, and its solution depends upon whether "the parties intended that the terms agreed on should merely be put into form or whether they should be subject to a new agreement the terms of which are not expressed in detail."

In my opinion, the latter is the proper conclusion. The first payment of \$10,000 is to be made on the execution of a formal agreement, and the appellant's undertaking is to complete the purchase and make the payments mentioned in the offer "when formal documents signed."

An important part of the consideration is the "75,000 shares of fully paid non-assessable stock in a company to be organised on the property;" and yet nothing is said as to the amount of the capital stock of the company, or the par value of the shares; nor, beyond the somewhat indefinite statement that the company is to be "organised on the property," is there anything to indicate the purposes for which or where or how it is to be incorporated.

It may be that the latter matter is left to the choice of the appellant, but I am unable to agree with the argument of his counsel that the other matters not provided for, which I have mentioned, were also to be left to him, in other words, that he might deliver shares of the par value of one cent, or one dollar, or any other par value, at his will.

Such an agreement might, of course, be made, but it seems to me a much more reasonable view of what the parties intended is that these were matters purposely left to be determined when the formal contract should be entered into, and the cash payment of \$10,000 was to be made.

D. C.

1910

STOW

v.

CURRIE.

Meredith, C.J.

D. C.

1910

STOW

v.

CURRIE.

Meredith, C.J.

The case seems to me to fall within what was said by Lord Blackburn in *Rossiter v. Miller*, 3 App. Cas. at p. 1151: "I quite agree with the Lords Justices that (wholly independent of the Statute of Frauds) it is a necessary part of the plaintiff's case to shew that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation."

The price to be paid for the property is, in my opinion, for the reasons I have mentioned, uncertain, and not less so than was the price to be paid by the plaintiff in *Douglas v. Baynes*, [1908] A.C. 477, and it was in that case held that what was relied on as an agreement could not be specifically enforced because of the uncertainty as to the price to be paid.

The appeal should, in my opinion, be dismissed with costs.

TEETZEL, J.:—I agree.

CLUTE, J. (after setting out the facts as above):—It will be seen that the option provides for the payment of \$10,000 in cash on the execution of a formal agreement. It further provides for the delivery to the defendants Currie and Otisse of 75,000 shares of fully paid non-assessable stock in a company to be organised on the property above mentioned, such stock to be delivered immediately after the formation of the company. No mention is made of the capital or other particulars of the company or when or by whom to be formed, and it is urged that the terms of the agreement are too indefinite to be enforced.

In *Winn v. Bull*, 7 Ch.D. 29, the defendant agreed to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract." No other contract was ever entered into between the parties, and it was held that there was no final agreement of which specific performance could be enforced against the defendant. Jessel, M.R., there quotes Lord Westbury, reported in *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638, as saying: "I entirely accept the doctrine . . . that if

there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." The Master of the Rolls then, observing that the judgment of Lord Westbury did not require any approval, but was approved of by the Court in *Rossiter v. Miller* (1877), 5 Ch.D. 648, proceeds: "It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to the new agreement the terms of which are not expressed in detail."

In *Rossiter v. Miller*, 5 Ch.D. 648, the Court of Appeal, approving and following the observations of Lord Westbury, held that specific performance could not be enforced, for, on the true construction of the documents, the signing of a formal contract was a condition precedent to the parties being bound. The House of Lords, however, 3 App. Cas. 1124, held that, under the circumstances of that case, the execution of a formal deed was not necessary, and the judgment of the Court of Appeal was reversed. The Lord Chancellor was at a loss to understand upon what principle the case of *Chinnock v. Marchioness of Ely* was supposed to bear upon the present case, but entirely agrees with the law as laid down by Lord Westbury. Lord Blackburn (3 App. Cas. at p. 1152) expresses the result of the decisions as follows: "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up."

In *Lloyd v. Nowell*, [1895] 2 Ch. 744, the agreement for purchase and sale of a house was made "subject to the preparation by the vendor's solicitor and completion of a formal contract;" it was

D. C.  
1910  
STOW  
v.  
CURRIE.  
Clute, J.

D. C.  
1910  
STOW  
v.  
CURRIE.  
Clute, J.

held that the vendor could not waive that stipulation as being intended for his benefit alone, so as to constitute the rest of the memorandum a final contract enforceable against the purchaser." Kekewich, J., after referring to the words of Lord Blackburn quoted above, says: "The question here is not whether this agreement was made subject to anything being done, but whether the stipulation is of the essence of the contract, the point being whether the vendor may waive it as being a provision intended solely for his own benefit."

Applying these authorities to the present case, I am of opinion that there was no binding contract; that the \$10,000 cash did not become payable until the execution of the formal agreement which was to be executed; the natural and reasonable construction of the document is that the further term in respect of the 75,000 shares would then have been settled and embodied in the formal agreement. But for the fact that it was not intended that any payment should be made until the formal agreement was executed, I should have had great difficulty in coming to the conclusion that the delivery of the 75,000 shares was not left to the plaintiff, to be paid for out of the capital shares of such a corporation as he might be pleased to organise; but, taking the whole agreement together, this view, in my judgment, is an impossible one. There never was in fact an enforceable agreement, and, this being so, the other issues raised in the action, and which were not tried, become unimportant.

The appeal should be dismissed with costs.

---



## [DIVISIONAL COURT.]

## RE DALE AND TOWNSHIP OF BLANCHARD.

D. C.

1910

May 5.  
June 29.

*Municipal Corporations—Money By-law—Voting on—Voters' List—Finality—Voters' Lists Act, sec. 24—List Prepared by Clerk from Assessment Roll—Persons Entitled to Vote—Freeholders—Leaseholders—Municipal Act, 1903, secs. 348, 349, 353, 354—Unqualified Voters—Persons in Possession of Land under Agreements of Sale—Inquiry into Right to Vote of Persons Named on List—Motion to Quash By-law.*

Upon a motion to quash a township by-law authorising the issue of debentures for the purpose of granting aid to a railway company:—

*Held*, that the certified list mentioned in sec. 24 of the Voters' Lists Act was not the list used or proper to be used in taking the vote on the by-law, but the list to be used was that prepared by the clerk from the assessment roll; and, therefore, the voters' list upon which the voting took place was not, by force of sec. 24, or for any other reason, conclusive as to the right of the persons named in it to vote on the by-law.

Reference to secs. 348 (amended by 8 Edw. VII. ch. 48, sec. 4), 349, 353, and 354 (amended by 9 Edw. VII. ch. 73, sec. 10), of the Consolidated Municipal Act, 1903.

All the municipal electors are not entitled to vote on a municipal by-law, but only those mentioned in sec. 353, freeholders, and in sec. 354, leaseholders.

The by-law was carried by a majority of 4; one vote was admittedly bad; and another was clearly bad, because the person who voted had no estate in the land in respect of which he voted, his only interest being as a shareholder of a company to which it belonged.

Three persons, who voted as freeholders, were in possession of the parcels of land in respect of which they voted under parol agreements with the owners, entitling them, on doing something which had not yet been done, to conveyances:—

*Held*, that they were not qualified as freeholders.

*In re Platt and United Counties of Prescott and Russell* (1890), 18 A.R. 1, applied and followed.

*Held*, therefore, that a sufficient number of unqualified persons voted to overcome the majority in favour of the by-law; and it was quashed accordingly.

Judgment of MULOCK, C.J.Ex.D., reversed.

APPLICATION by William Dale to quash a money by-law of the township granting aid to the St. Mary's and Western Ontario Railway Company.

March 9. The application was heard by MULOCK, C.J.Ex.D., in the Weekly Court at Toronto.

C. C. Robinson, for the applicant.

J. S. Fullerton, K.C., for the Corporation of the Township of Blanchard.

May 5. MULOCK, C.J.:—Various objections were taken to the proceedings connected with the voting upon the by-law, but in substance they resolve themselves into two: one being, that the

Mulock, C.J.  
1910  
RE  
DALE  
AND  
TOWNSHIP  
OF  
BLANCHARD.

by-law did not receive a majority of the votes of the persons qualified to vote thereon; and the other, that the voting was not conducted in accordance with the principles laid down in the Municipal Act.

The facts relied upon by the applicant in support of the first objection are as follows:—

The voting on the by-law took place on the 19th November, 1909, 244 votes being given in its favour and 240 against it, thus resulting in a majority of 4 for the by-law.

The list used for the purpose of such voting was that certified to by the County Court Judge on the 6th November, 1909. The applicant contends that such was not the proper list, but that the voters' list of 1908 was the last revised and certified list, and therefore should have been the one used on such voting. This contention rests on the following grounds. The assessment roll for 1909 was returned to the clerk of the municipality on Saturday the 29th April. Within the fourteen days allowed by sec. 65 of the Assessment Act, 4 Edw. VII. ch. 23, in which to appeal, a considerable number of appeals against the roll were duly filed with the clerk. On the 18th May the Court of Revision met and tried the appeals, and the roll was purported to be finally revised and corrected in accordance with the decisions of the Court of Revision. The Court, however, was not entitled to try these appeals until ten days after the last day for appealing: sec. 61 of the Assessment Act. Thus its action in disposing of the appeals in question on the 18th May was a nullity: *Re Dale and Township of Blanchard* (1909), 14 O.W.R. 704, 1 O.W.N. 65.

The clerk then prepared, on the basis of such revised and corrected roll, the alphabetical list of voters required by sec. 6 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, and adopted the various steps called for by the Voters' Lists Act, with a view to the list being finally revised and certified to by the Judge. No appeals were made against the list of voters thus prepared by the clerk, and the same was duly certified to by the Judge on the 6th November, 1909.

On these facts the applicant contends that, inasmuch as the Court of Revision had no legal right to sit on the 18th May and adjudicate in respect of the appeals from the assessment roll, it was not competent to the Judge to revise and to certify to the voters' list.

It was the duty of the Court of Revision to try each of the appeals in question: sec. 62 of the Assessment Act; and that before the 1st July, 1909: sub-sec. 20 of sec. 65 of the Assessment Act.

By sub-sec. 1 of sec. 68 of the Assessment Act, "An appeal to the County Judge shall lie, at the instance of the municipal corporation, or at the instance of the assessor, or assessment commissioner, or at the instance of any ratepayer of the municipality, not only against a decision of the Court of Revision on an appeal to the said Court, but also against omission, neglect or refusal of the said Court to hear or decide an appeal."

The Court not having before the 1st July tried the appeals, it was competent, under this section, for any ratepayer to have appealed to the Judge against such omission of duty.

Suppose the Court of Revision were to hold a legal meeting to deal with appeals, and, for some reason, omitted to try one appeal, such omission would come within the express provisions of sub-sec. 1 of sec. 68, and be appealable. In effect such an omission, as regards appeals not tried, would be the same as if the Court had not held a legal meeting, as required by the Assessment Act.

I think, therefore, that, whether the Court omits to hold a legal meeting, or, holding a legal meeting, omits to try all complaints, as required by sec. 62 of the Assessment Act, in either case an appeal lies to the Judge, and, if no appeal is taken, sub-sec. 16 of sec. 6 of the Voters' Lists Act applies.

That sub-section reads as follows: "Where no appeal is made from the Court of Revision of the municipality to the County Court Judge as provided by the Assessment Act, the assessment roll shall be deemed to be finally revised and corrected when the time within which an appeal may be made has elapsed," etc.

In this case, no appeal having been taken because of the omission of the Court of Revision to sit within the time prescribed by the Assessment Act, to dispose of appeals made to that body, or for any other reason, the assessment roll in question, because of the absence of any appeal therefrom, became "deemed to be finally revised and corrected," and constituted a legal basis for the preparation of the voters' list of 1909, and, on its being certified to by the Judge on the 6th November, 1909, it became the proper list to be used for the purposes of the voting on the by-law.

For these reasons, I am of opinion that the objection because of the list of 1909 having been used, fails.

Mulock, C.J.

1910

RE  
DALE  
AND  
TOWNSHIP  
OF  
BLANCHARD.

Mulock, C.J.  
1910  
RE  
DALE  
AND  
TOWNSHIP  
OF  
BLANCHARD.

Another objection is, that "several persons voted upon the by-law who were not entitled so to vote." The persons in this objection referred to are those whose names appear on the last revised and certified voters' list, as entitled to vote, but who, the applicant contends, did not possess the qualification entitling them to have their names placed on the list.

It is not open to this Court to deal with this class of objection. By sec. 24 of the Voters' Lists Act, "The certified list shall, upon a scrutiny, under the Ontario Election Act, or the Municipal Act, be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used; except," etc. The exceptions have no bearing upon this case. This section has been construed in *Re Mitchell and Municipal Corporation of Campbellford* (1908), 16 O.L.R. 578, and held applicable to voting on municipal by-laws. I am, therefore, of opinion that it is not competent to the applicant to call in question the findings of the County Court Judge as to the qualifications of the persons whose names he has placed upon the voters' list. This objection, therefore, fails.

The next objection is, that the voting upon the by-law was not conducted in accordance with the principles laid down in the Municipal Act, and that the result of the voting was thereby affected.

There is conflicting evidence with reference to the matters contemplated by this objection; but I do not think the evidence shews that the election was not conducted substantially in accordance with the principles laid down in the Consolidated Municipal Act, 1903, nor that the result of the election was affected by any non-compliance, mistake, or irregularities. Therefore, the last objection fails.

This litigation, I think, owes its origin to the conduct of the Court of Revision in dealing with the appeals at an illegally held meeting, and in omitting to call a legal meeting whereby the appeals might be legally dealt with.

Under the circumstances of the case, I dismiss the application, but without costs.

The applicant appealed from the order of MULOCK, C.J.

June 16. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.



*C. C. Robinson*, for the appellant. The by-law was passed by a majority of 4, and the contention of the applicant is that more than 4 of those who voted upon the by-law were not qualified so to vote. The learned Chief Justice has held that the Court is precluded by sec. 24 of the Voters' Lists Act, 7 Edw. VII. ch. 4, from inquiring into the qualification of those whose names appear upon the voters' list of the municipality. But this is a by-law for contracting a debt, and the lists of voters used in such cases are prepared from the assessment roll under sec. 348 of the Municipal Act, 3 Edw. VII. ch. 19: *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488, 13 O.L.R. 447, at pp. 448, 450, 451, 454; *In re McGrath and Town of Durham* (1908), 17 O.L.R. 514, at p. 516. It is submitted, therefore, that the voters' list prepared under the Voters' Lists Act was not the proper list to be used at the voting on this by-law, and that sec. 24 of that Act has no application. And, if that is so, secs. 353 and 354 of the Municipal Act, which provide that to entitle a person to vote upon a by-law of this kind he must not only be rated on the assessment roll, but must also be qualified to vote, point to the admissibility of an inquiry into his qualification: *In re McGrath and Town of Durham*, 17 O.L.R. 514, at pp. 526, 529. The evidence in this case shews clearly that, of five voters whose qualification is objected to, two owned no property at all, while the other three had only an equitable interest. Such an interest does not qualify them to vote as freeholders: *In re Flatt and United Counties of Prescott and Russell* (1890), 18 A.R. 1; *Township of Osgoode v. York* (1895), 24 S.C. R. 282; *Township of McKillop v. Township of Logan* (1899), 29 S.C.R. 702.

*J. S. Fullerton*, K.C., and *J. W. Graham*, for the respondents. Section 24 of the Voters' Lists Act applies to the lists of voters used in voting on this by-law, and precludes any inquiry into the qualification of the persons named therein. The reasoning in *In re McGrath and Town of Durham*, 17 O.L.R. 514, is applicable here. The amendment by 8 Edw. VII. ch. 48, sec. 4, to sec. 348 of the Municipal Act, shews that that section was not intended to apply exclusively to a money by-law. The clerk complies with that section by checking the statutory voters' list with the assessment roll and striking off the names of those who do not appear by the roll to be qualified to vote. The voters objected to all had the necessary property qualifications: *Sawers v. City of Toronto* (1902),

D. C.  
1910  
RE  
DALE  
AND  
TOWNSHIP  
OF  
BLANCHARD.

D. C.  
1910  
RE  
DALE  
AND  
TOWNSHIP  
OF  
BLANCHARD.  
Meredith, C.J.

4 O.L.R. 624. An equitable freeholder comes within secs. 353 and 354 of the Municipal Act. *In re Flatt and United Counties of Prescott and Russell*, 18 A.R. 1, is distinguishable, in that it dealt with a different statute.

June 29. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the applicant, William Dale the younger, from an order of the Chief Justice of the Exchequer Division, dated the 5th May, 1910, dismissing his motion to quash by-law No. 8 of the township of Blanchard, intituled "A by-law to Authorise the Issue of Debentures of the Township of Blanchard to the amount of \$20,000 for the Purpose of Granting Aid to the Extent of \$20,000 to the St. Mary's and Western Ontario Railway Company."

In the view we take, it is unnecessary to express an opinion upon any of the objections urged against the by-law except two, *viz.*, whether (1) the voters' list upon which the voting took place is, by force of sec. 24 of the Voters' Lists Act, or for any other reason, conclusive as to the right of the persons named in it to vote on the by-law; and whether (2), if it is not conclusive as to their right to vote, the appellant has succeeded in establishing that a sufficient number of unqualified persons voted to overcome the majority which was cast in favour of the by-law.

The voters' list which sec. 24 makes, upon a scrutiny, final and conclusive evidence that all persons named therein, and no others, were qualified to vote, is the voters' list which was, or was the proper list to be, used at the election.

The voters' list with which the Act deals is made up in three parts, the first containing the names of all male persons entitled to vote at both provincial and municipal elections; the second, the names of all other male persons and of all widows and unmarried women appearing by the assessment roll to be voters at municipal elections but not at provincial elections; and the third, the names of all other male persons appearing by the assessment roll to be voters at provincial but not at municipal elections.

The voters' list to be used when a vote is being taken on a money by-law is provided for by secs. 348 and 349 of the Consolidated Municipal Act, 1903, and this list the clerk of the municipality is to prepare from the last revised assessment roll; and the only use

he is required to make of the voters' list prepared under the Voters' Lists Act is to see that every person entered on his list is named or intended to be named on the voters' list.

All the municipal electors are not entitled to vote on a money by-law, but only those of them who are mentioned in sec. 353, which deals with freeholders, and in sec. 354, which deals with leaseholders, and it is not, as has been seen, from the last certified voters' list, but from the last revised assessment roll, that the clerk is to prepare a list of those entitled to vote.

Section 348 was amended by 8 Edw. VII. ch. 48, sec. 4, by striking out the reference to schedule C.; and sec. 354 was amended by 9 Edw. VII. ch. 73, sec. 10, by adding the following proviso: "And provided further that he has at least ten days next preceding the day of polling filed in the office of the clerk of the municipality a statutory declaration stating that his lease meets the above requirements, and the clerk shall insert or otherwise designate the names of such tenants in the voters' list prepared in accordance with the provisions of section 348 of this Act, and the notice required by sub-section 3 of section 338 of this Act shall also contain a statement that the names of leaseholders neglecting to file such a declaration shall not be placed on the voters' list for such voting."

The certified list mentioned in sec. 24 of the Voters' Lists Act was not the list used or proper to be used in taking the vote on the by-law, but the list to be used was that prepared by the clerk from the assessment roll; and the first question must, therefore, be answered in the negative.

As to the second question, we are bound by the decision of the Court of Appeal in *In re Flatt and United Counties of Prescott and Russell*, 18 A.R. 1, to hold that B. F. Doupe, Wesley Shier, and Richard Selves were not qualified voters.

Assuming everything in favour of the respondents, the highest position of these three men was that of persons who were in possession of the land, as freeholders of which they voted, under parol agreements with the owners entitling them, on doing something which had not yet been done, to a conveyance of the land, and such persons were held by the Court of Appeal not to be freeholders within the meaning of sec. 9 of the then Municipal Act, R.S.O. 1887, ch. 184. Street, J., had decided, after inquiry, that the persons whose right to petition as freeholders was questioned were in a

D. C.

1910

RE

DALE

AND

TOWNSHIP  
OF  
BLANCHARD.

Meredith, C.J.

D. C.  
1910  
RE  
DALE  
AND  
TOWNSHIP  
OF  
BLANCHARD.  
Meredith, C.J.

position to compel specific performance by their vendors, and were, therefore, equitable freeholders and entitled to petition, so that the decision of the Court of Appeal, reversing his decision, is conclusive against the right of the three persons I have named to vote, unless the case can be distinguished on the ground that in the enactment which was then under consideration the term "freeholder" is used in a sense different from that in which it is used in sec. 353, and I can find no reason for coming to that conclusion. The purpose of the petition in that case was to obtain the incorporation of a village, and the purpose of the by-law in question is to impose an indebtedness upon the municipality, in the one case on the initiative and in the other by the vote of a part only of the ratepayers and against the will of a minority.

It is perhaps to be regretted that the Court was unable to put a more liberal construction on the statute, but that is now a matter for the Legislature, if the construction given to it does not accord with the intention of the Legislature in passing it.

The vote of R. C. Hunter is clearly bad. He had no estate in the land in respect of which he voted. It belonged to a company in which he was a shareholder, and that was his only interest in it; and Homer Doupe's vote was admittedly bad.

The by-law was carried by a majority of 4 only, and, these 5 votes being bad, it follows that it did not receive the assent of the majority of the voters, and must be quashed.

The appeal will, therefore, be allowed, and there will be substituted for the order of the learned Chief Justice an order quashing the by-law with costs, and the respondents must pay the costs throughout.

---



## [IN THE COURT OF APPEAL.]

## BEARDMORE V. CITY OF TORONTO.

C. A.

1910

June 30.

*Constitutional Law—Powers of Provincial Legislature—Authorising Municipal Corporations to Acquire and Distribute Electric Energy—B.N.A. Act, sec. 92 (8), (10)—Validation of Contracts with Hydro-Electric Power Commission—Stay of Pending Actions—Right of Court to Inquire into Validity of Statutes.*

*Held*, affirming the judgments of BOYD, C., and a Divisional Court, 20 O.L.R. 165, and approving the judgments of RIDDELL, J., and a Divisional Court in *Smith v. City of London* (1909), *ib.* 133, that the statutes in question in both actions were *intra vires* of the Ontario Legislature.

AN appeal by the plaintiff from the order of a Divisional Court affirming the judgment of BOYD, C., after the trial, dismissing the action, which was brought for a declaration that a certain contract between the defendants and the Hydro-Electric Power Commission was illegal and void and for an injunction restraining the defendants from acting upon the contract. The judgment of BOYD, C., is reported in 20 O.L.R. 165, and at the end of the report there is a note of the affirmance by the Divisional Court, following *Smith v. City of London* (1909), 20 O.L.R. 133.

May 12. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., and BRITTON, J.

*E. F. B. Johnston*, K.C., and *H. O'Brien*, K.C., for the plaintiff. The Acts of the Legislature of Ontario in question, whereby the defendants are authorised to enter into and carry out certain contracts with the Hydro-Electric Commission of Ontario for the transmission, user, and distribution of electric energy, not only for the public purposes of the municipality, but for private purposes as well, are *ultra vires* of the Legislature of Ontario, in that they interfere with trade and commerce, which by virtue of the B.N.A. Act is a class of legislation exclusively belonging to the Parliament of Canada. The carrying on of a private and purely commercial business in supplying heat, light, or power for private purposes is not within the functions of municipal institutions in this Province. The lighting of private houses does not come within "municipal institutions." To find out what is within the powers of the Legislature, we have to find out what are municipal institutions. Private lighting does not come within "municipal institutions;" therefore

C. A.  
1910  
BEARDMORE  
v.  
CITY OF  
TORONTO.

it is not within their power. A municipal corporation may, for the public purposes of the municipality, manufacture or acquire electric energy for the purposes of lighting its public buildings and streets, but it has no right, nor can the Legislature confer on it the right, to engage in any matter of purely private enterprise or business. Private lighting is not for the security, welfare, or convenience of the municipality, nor does it constitute any part of the governmental, functional, or administrative part of the municipal institutions of the Province. The effect of the Acts in question, if *intra vires* of the Legislature, would be to convert a municipality into a private commercial corporation, carrying on a private business, which cannot be part of the powers of a municipal institution within the Province. Section 8 of 9 Edw. VII. ch. 19 (O.) is *ultra vires*, because it was not passed under property and civil rights, but to prevent attacks on certain statutes, and no legislation can destroy the civil right of a citizen to attack it. Any legislation that purports to give to a municipality the right to engage in any private business, is *ultra vires*. Reference to *Gilbert v. Corporation of Trinity House* (1886), 17 Q.B.D. 795, 800; *Fox v. Government of Newfoundland*, [1898] A.C. 667, 672; *Bollander v. City of Ottawa* (1898-1900), 30 O.R. 7, 27 A.R. 335; *In re Virgo and City of Toronto* (1893), 20 A.R. 435; *S.C. sub nom. City of Toronto v. Virgo*, [1896] A.C. 88; *Mauldin v. City Council of Greenville* (1889), 33 S.Car. 1.

*J. R. Cartwright*, K.C., for the Crown. Questions such as this were not intended to be included in the words "trade and commerce" in sec. 91 of the B.N.A. Act: *Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario*, [1897] A.C. 231. The argument in regard to municipal institutions is based on a misconception. The whole case is fully dealt with in the judgments of the Chancellor in this case and *Smith v. City of London*.

*H: L. Drayton*, K.C., and *H. Howitt*, for the defendants. The Acts of the Legislature in question herein are *intra vires*, as relating to matters coming within municipal institutions, local works and undertakings, property and civil rights in the Province, the administration of justice in the Province, matters of a merely local or private nature in the Province, all of which are subjects declared by sec. 92 of the B.N.A. Act, 1867, to be within the exclusive authority of the Provincial Legislatures. The supply of light, heat,

and power to the inhabitants of a municipality is a matter concerning the welfare and convenience of the inhabitants, and cannot be provided apart from municipal consent and franchise, and comes peculiarly within "municipal institutions." Light, heat, and power, prior to the B.N.A. Act, were by legislation and municipal administration definitely determined to be matters relating to municipal institutions: *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348; *Hodge v. The Queen* (1883), 9 App. Cas. 117. The installation of a plant supplying electric power, heat, and energy to the Corporation of Toronto and its inhabitants is purely in the nature of a local work or undertaking. It does not in any sense affect trade or commerce, although by its means, as by the use of coal and water, certain businesses are enabled to be carried on. Such an undertaking is not in any sense within item 2 of sec. 92 of the B.N.A. Act, 1867: *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Citizens' Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *Hull Electric Co. v. Ottawa Electric Co.*, [1902] A.C. 237. The ratification of the contracts and by-laws in question and legislative provision that the same shall not be questioned, but that all actions brought for such purpose shall be stayed, are matters coming within "property and civil rights within the Province," and "administration of justice in the Province:" *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275; *Smith v. City of London*, 20 O.L.R. 133.

June 30. Moss, C.J.O.:—This is an appeal by the plaintiff from a judgment of a Divisional Court affirming the judgment of the Chancellor of Ontario delivered after the trial, dismissing the action.

The statement of claim, as expanded by a series of amendments made from time to time during the progress of the litigation, raised a number of questions touching the validity and effect of a contract which, for present purposes, may be treated as entered into solely between the Hydro-Electric Power Commission of Ontario and the City of Toronto for the supply of electric power and energy, upon certain terms set forth therein. But in the end the matter resolved itself into a question of the legislative competency of the Legislature of the Province to enact in whole or in part the Acts 6 Edw. VII. ch. 15, 7 Edw. VII. ch. 19, 8 Edw. VII. ch. 22, and 9 Edw. VII. ch. 19.

C. A.  
1910  
BEARDMORE  
v.  
CITY OF  
TORONTO.

C. A.  
1910  
BEARDMORE  
v.  
CITY OF  
TORONTO.  
MOSS, C.J.O.

And upon the appeal to this Court the argument was substantially confined to the discussion of two questions, *viz.*, whether the Legislature had legislative power to authorise and empower the City of Toronto to manufacture, or, by contract with the Hydro-Electric Power Commission, acquire, electric power and energy, and not only use such power and energy for lighting its streets and buildings and for purposes of a cognate character (which it was conceded might be done), but also sell and dispose thereof to private citizens and others for use by them; and whether recourse to the Courts for the purpose of testing the constitutional validity of the legislation is barred by the provisions of the Act 9 Edw. VII. ch. 19.

The legislation has been upheld by the learned Chancellor as *intra vires* the Legislature, affirming, however, the proposition that the Courts are not deprived of the right to inquire into the question of legislative competence. There is no dispute as to the facts, and his judgment, reported in 20 O.L.R. 165, sets forth the main contentions on both sides.

There was another action of *Smith v. City of London*, 20 O.L.R. 133, involving precisely the same questions, in which the whole ground had been traversed by the trial Judge and a Divisional Court, and a similar conclusion arrived at.

In dealing with this appeal it does not appear to be necessary for us to go beyond the well-considered judgment pronounced by the learned Chancellor, speaking for the Divisional Court, in the case of *Smith v. City of London (supra)*. All the considerations pressed upon us by counsel for the appellant in this case appear to be fully and completely answered, and it would be but idle repetition to travel once more over the same ground.

The appellant concedes the right of the Legislature to empower municipal corporations to manufacture or acquire electric power and energy for use in their own municipal and civic concerns, but denies the power to enable them to dispose of energy, so manufactured or acquired, to others to be used by them for their private purposes.

Whatever may be said on the general economic or political aspect of the subject, the decisions of the Courts, a number of which are discussed in the judgments in *Smith v. City of London (supra)*, appear to lead irresistibly to a conclusion in favour of the legislative competence.



The conclusions of this Court accord with those of the learned Chancellor.

The result is that the appeal fails and should be dismissed.

MEREDITH, J.A.:—This appeal is entirely a hopeless one. It is admittedly hopeless if the subject-matter of the legislation in question were within the powers of the Provincial Legislature; and it seems to me equally hopeless to contend that it was not.

A municipality desires to join in a purely provincial project, with a view to reducing the cost to its inhabitants of those three great necessities, heat, light, and power. Why may it not be empowered, by provincial legislation, to do so? That legislative body has exclusive power to make laws relating to "municipal institutions in the Province," and to "local works and undertakings" other than certain specified works, which in no sense include such a work as that in question, as well as to "property and civil rights in the Province." Surely these exclusive powers plainly cover the project in question, and the legislation in question.

The subject-matter of the legislation being one within the power of the Legislative Assembly which enacted the legislation, it ought to be obviously hopeless to contend that an appeal lies from that ultimate Court to this inferior Court, against its legislation: see *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525, at p. 536.

Whether any of the provisions of the legislation in question are hard or unusual is a matter regarding which we have no right to busy ourselves; but it long has been the subject of very proper criticism that the law should allow a single ratepayer of a municipality, for ulterior or sinister purposes, to sue *in the name of all the ratepayers*, although *entirely against their will and desire*, to upset any project, however desirable, and though unanimously desired by the ratepayers, with the single exception of the plaintiff. I am not intimating, nor do I suppose, that that is the position of the plaintiff in this action; but, if it were, his legal standing would be the same; a state of affairs which seems to me anomalous and regrettable.

I would dismiss the appeal.

GARROW and MACLAREN, JJ.A., and BRITTON, J., concurred.

C. A.

1910

BEARDMORE

v.

CITY OF  
TORONTO.

Meredith, J.A.

## [IN THE COURT OF APPEAL.]

C. A.

1910

June 30.

## DOMINION EXPRESS CO. v. MAUGHAN.

*Partnership—Holding out—Estoppel—Representation of Authority—Public Repute—Knowledge—Actual Authority—Scope of Business.*

*Held*, upon the evidence, that there was no actual partnership between the defendant J.M. and his son the defendant H.M., carried on in the firm name of J.M. & Son; and (reversing the judgment of a Divisional Court, 20 O.L.R. 310) that there was no holding out by J.M. of his son H.M. as a member of the partnership; MEREDITH, J.A., dissenting.

*Per Moss, C.J.O.*, that the facts shewed it to be not a case of J.M. holding out his son to the plaintiffs as a partner, but of his son assuming to hold himself out to the plaintiffs as in partnership with his father. If the father was to be made liable, it must be because what was done was done under circumstances which bound him as well as his son; and there was no proof of any express authority, or of any acts from which authority might reasonably be inferred, to the son to represent his father as in partnership with him.

*Per MIDDLETON, J.*, that the plaintiffs must fail, because, assuming in their favour that there was a holding out, no evidence was given to shew that at the time credit was given the plaintiffs knew of the circumstances now relied on as constituting a "holding out," or that they gave credit upon the faith of any public repute which would satisfy a jury "that the plaintiffs knew of it and believed him to be a partner:" *Dickinson v. Valpy* (1829), 10 B. & C. 128, 140; *Ford v. Whitmarsh* (1840), Hurl. & Walm. 53. And again, the plaintiffs failed because the holding out was of a partnership as "general insurance agents," while the liability sought to be imposed was as "agents for the sale of signed money orders" issued by the plaintiffs, and such an agency was beyond the scope of the business held out.

*Per MEREDITH, J.A.*, that, upon the undisputed facts, there was authority from the father to the son to use the father's name and to pledge his credit; and, assuming that that authority extended only to the business of insurance agents, the transaction in question was sufficiently connected with that business to come within the authority.

An appeal by the defendant John Maughan from the order and decision of a Divisional Court, 20 O.L.R. 310, reversing the judgment of RIDDELL, J., at the trial, and directing that judgment be entered for the plaintiffs against the appellant, who alone defended.

The action was brought to recover \$1,395.13, being the amount of certain money orders alleged to have been drawn by John Maughan & Son, as agents for the plaintiffs, and for indemnity in respect of another order not accounted for. The appellant denied any agency either by himself or his firm for the plaintiffs, and asserted that the agency, if any, was the defendant Harry Maughan's individually, and also denied that Harry Maughan was a member of the firm of John Maughan & Son, and denied that Harry Maughan had any right to use the name of John Maughan & Son.

The Divisional Court found that the defendant John Maughan had held out the defendant Harry Maughan as his partner, and was liable to the plaintiffs.

May 5 and 6. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A., and MIDDLETON, J.

*W. R. Smyth*, K.C., and *W. J. Boland*, for the appellant. There was no evidence that the plaintiffs gave credit to Harry Maughan upon the strength of any representation made by John Maughan, or that credit was given by reason of advertisement of the firm name in the directory, or otherwise. Even if there were a holding out by the appellant of Harry Maughan as a partner, the cases shew that, in order to make out a case of estoppel, the holding out must be to the person who makes the claim, and the credit must be given upon the basis of the holding out. These are questions of fact, and have been found against the plaintiffs by the learned trial Judge, whose finding should not be interfered with unless plainly erroneous. Even if it were considered that Harry Maughan was held out as a partner, it is submitted that the transaction in question was not within the scope of the ordinary business of the partnership as insurance agents, and therefore the action of Harry Maughan could not bind the firm. They referred to the following cases and authorities: Story on Partnership, 7th ed., secs. 111, 113; *Hope v. Cust* (1774), cited in *Shirreff v. Wilks* (1800), 1 East 48, 53; Pollock on Partnership, 8th ed., pp. 33, 34, 36, 37; *Yates v. Dalton* (1858), 28 L.J.N.S. Ex. 69; *Greenslade v. Dower* (1828), 7 B. & C. 635; *Garland v. Jacomb* (1873), L.R. 8 Ex. 216; *Frankland v. McGusty* (1830), 1 Knapp 274; Lindley on Partnership, 7th ed., p. 201; Byles on Bills, 16th ed., p. 55; *Jacobs v. Morris*, [1901] 1 Ch. 261.

*Shirley Denison*, for the plaintiffs. The evidence shews that Harry Maughan was actually a partner in the firm of John Maughan & Son, and that, even if he were not, the appellant was estopped from denying that such was the case. On the question of estoppel, *Martyn v. Gray* (1863), 14 C.B.N.S. 824, is a very strong authority in favour of the plaintiffs' contention. See also *Mollwo March & Co. v. Court of Wards* (1872), L.R. 4 P.C. 419, at p. 435; *Codville Georgeson Co. v. Smart* (1907), 15 O.L.R. 357; *Fletcher v. Pullen* (1889), 16 Atl. Repr. 887; and *Rogers v. Murray* (1888), 110 N.Y. 658. As to the existence of a partnership, the evidence shews the presence of the *indicia* usually relied on to prove such a relationship. These are not questions of fact in the ordinary sense, depending upon the credibility or demeanour of the witnesses, but questions

C. A.

1910

DOMINION  
EXPRESS  
Co.  
v.  
MAUGHAN.

C. A.  
 1910  
 DOMINION  
 EXPRESS  
 Co.  
 v.  
 MAUGHAN.

as to the application of legal principles to admitted facts, upon which, therefore, the findings of the trial Judge should not prejudice either party in the appeal. See *Wheatcroft v. Hickman and Cox v. Hickman* (1860), 9 C.B. N.S. 47, *per* Pollock, C.B., at p. 85, as to the respective functions of Judge and jury in such cases. On the question of the scope of Harry Maughan's authority, it is submitted that, if we assume that either a partnership or a holding out sufficient to create an estoppel has been proved, there was ample power for him to undertake the business of issuing money orders, and, as a matter of fact, he had done similar business with the Canadian Express Company for two years, to the knowledge of the plaintiffs. Reference was made to *Sandilands v. Marsh* (1819), 2 B. & Ald. 673; *Rhodes v. Moules*, [1895] 1 Ch. 236; and the cases cited in the argument in the Court below, 20 O.L.R. 310, at p. 311.

*Smyth*, in reply. Cases on the line of *Martyn v. Gray* and *Codville Georgeson Co. v. Smart*, cited by counsel for the plaintiffs, shew on examination that there was knowledge on the part of the person held out as a partner that he was being so held out, which is not the case here. The evidence as to the issuing of money orders by Harry Maughan for the Canadian Express Co. is not relevant to the issue before the Court, and this objection was taken at the trial. The test of partnership is intention, and the evidence confirms the finding of the trial Judge that Harry Maughan was not a partner in the firm. [MEREDITH, J.A., suggested that it was a question of agency rather than of partnership.] That is another point. If Harry Maughan was an agent, he was so only in respect of insurance business, and the issuing of money orders was not within the scope of his authority.

June 30. Moss, C.J.O.:—The action is brought against John Maughan & Son, but the substantial defendant is John Maughan, who alone defends.

The plaintiffs base their claim against him on two grounds: first, that there was an actual partnership between John Maughan and his son Harry, carried on in the firm name of John Maughan & Son; and, secondly, that there was a holding out by John Maughan of his son Harry as a member of the partnership.

Upon the evidence and the findings of the learned trial Judge, which were not questioned by the Divisional Court, in so far as the



first branch of the case is concerned, it must be taken to be well established that Harry was not in fact a partner in his father's business. He was a clerk and assistant in the office, being paid a salary for his services, and, in addition, he was carrying on upon his own account a marine insurance business which had been handed over to him by his father. The latter's business account at the bank stood in his own name, and his son never signed cheques or drew against it, nor was he authorised to do so.

John Maughan carried on his business under the name of John Maughan & Son when his son Herbert, now deceased, was associated with him, and he continued the name after Herbert's death. In this there was nothing wrong, but the plaintiffs now virtually take the position that the assertion by Harry that he was the "Son" amounted to his father holding him out as a partner, notwithstanding that he was a mere employee.

Harry signed the business name, as any clerk or assistant might do, to ordinary or merely formal papers, but contracts or important documents were always signed by John Maughan himself. His son was not treated as a partner nor given the rights of a partner in any respect.

There was a total absence of that species of agency which results from a partnership between individuals. And it is quite clear that John Maughan did not intend his son to exercise the rights or powers of a partner in fact.

It was therefore an improper and wrongful act towards John Maughan to assume to enter into and sign the contract upon which the plaintiffs base their claim, unless John Maughan expressly or impliedly authorised him to do so. John Maughan's testimony is that he had no dealings with the plaintiffs and no knowledge of his son's dealings with them, and none of the orders sued upon were used for the purposes of his business.

As to the second branch of the plaintiffs' case, it is, of course, unquestionable law that, if one, by statements, acts, or conduct, represents or holds out to the world another as his co-partner, any person dealing with the person so represented to be a partner on the faith of such holding out can hold the person so representing or holding out responsible for the dealings of the other within the scope of the business. But it is also settled law that only those persons who deal with the person so represented to be a partner, with the

C. A.

1910

DOMINION  
EXPRESS  
Co.

v.

MAUGHAN.

Moss, C.J.O.

C. A.

1910

DOMINION  
EXPRESS  
CO.

v.

MAUGHAN.

Moss, C.J.O.

knowledge and upon the faith of his being held out as a partner, can look to the person who has held him out as his partner.

The liability rests not upon agency or authority to deal, but upon the doctrine of estoppel, which prevents the person making a representation, upon the faith of which another acts to his loss or prejudice, from denying that the facts are as he represented them.

The facts in this case shew it to be not a case of John Maughan holding out his son to the plaintiffs as a partner, but of his son assuming to hold himself out to the plaintiffs as in partnership with his father. There can be no question of the son's liability to the plaintiffs, but how does the case stand as against the father? If he is to be made liable, it must be because what was done was done under circumstances which bound him as well as his son. It is incumbent on the plaintiffs to prove authority, express or implied, to the son to represent his father as in partnership with him. And there is no proof of any express authority or of any acts from which such authority may reasonably be inferred.

According to the evidence of Barron, the person with whom Harry Maughan dealt, he had apparently not previously known anything of either of the Maughans. Sutherland, who introduced Harry Maughan to Barron, was not called as a witness.

There was no inquiry, and nothing takes place except the signing by Harry Maughan of the contract, and the delivery to him of the order book. There were no communications directly between the plaintiffs and John Maughan.

The plaintiffs acted upon what was said by Sutherland and done by Harry Maughan. But if by what Sutherland said he meant to convey that John Maughan and Harry Maughan were partners, the statement was not in accordance with the real facts, and Harry's acts could not alter the facts or estop John Maughan from shewing the facts.

It is a question of fact in this, as in every case of the kind, whether what was done by Harry Maughan was done with the authority, express or implied, of John Maughan, or whether the plaintiffs were placed in such a situation through the acts or conduct of John Maughan as to estop him from shewing the actual facts. The plaintiffs failed before the learned trial Judge, and rightly so upon the evidence.

The appeal must, therefore, be allowed and the judgment at the trial restored, with costs of the appeal and of the appeal to the Divisional Court.

GARROW and MACLAREN, JJ.A., concurred.

MIDDLETON, J.:—The law governing this case, as presented by the plaintiffs, is accurately stated by Lord Wensleydale in *Dickinson v. Valpy* (1829), 10 B. & C. 128, 140: "If it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that *the plaintiff* knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he was engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement."

In the later case of *Ford v. Whitmarsh* (1840), Hurl. & Walm. 53, the same learned Judge, in giving the judgment of the Exchequer Chamber, said: "The defendant would be liable if the debt was contracted whilst he was actually a partner, or upon a representation of himself as a partner to the plaintiff, or upon such a public representation of himself in that character as to lead the jury to conclude that the plaintiff, knowing of that representation, and believing the defendant to be a partner, gave him credit under that belief."

Accepting this as the test in the case at bar, the plaintiffs must fail, because, assuming in their favour that there was a holding out, no attempt was made at the trial to bring the case within either branch of the rule. No evidence was given to shew that at the time credit was given the plaintiffs knew of the circumstances now relied on as constituting a "holding out," or that they gave credit upon the faith of any public repute which would satisfy a jury "that the plaintiffs knew of it and believed him to be a partner." The trial Judge, who here occupied the position of the jury, was not so satisfied, and there was not any evidence upon which he could be asked so to find.

The point is further illustrated by the case of *Edmanson v. Thompson and Blakey* (1861), 8 Jur. N.S. 235. The head-note,

C. A.

1910

DOMINION  
EXPRESS  
CO.

v.

MAUGHAN.

Middleton, J.

C. A.  
1910  
DOMINION  
EXPRESS  
Co.  
v.  
MAUGHAN.  
Middleton, J.

which accurately expresses the effect of the judgment of the full Court, delivered by Pollock, C.B., is as follows: "A person who is not a partner, as between the proprietor and himself, is not so towards third parties, although the latter may have been told by the proprietor that he is, and although he may have performed what are ordinarily the functions of a partner, and may have told others that he is one, they not having communicated the same to the person who seeks to make him responsible."

In *Thompson v. First National Bank of Toledo* (1884), 111 U.S. 529, Mr. Justice Gray carefully reviews the earlier English cases relied upon by the plaintiff, and satisfactorily demonstrates that they do not support the contention advanced. The Court there held, "A person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out." See also *Pott v. Eytton* (1846), 3 C.B. 32.

The necessity of knowledge by the plaintiff of the facts relied upon would appear to be plain, when it is remembered that the liability is based upon estoppel: *Scarj v. Jardine* (1882), 7 App. Cas. 345.

For another reason the plaintiffs in my view fail. The holding out was of a partnership as "general insurance agents." The liability sought to be imposed is as "agents for the sale of signed money orders" issued by the express company. Such an agency is beyond the scope of the business held out.

Upon the argument of the appeal it was suggested that the plaintiffs might have presented their case in a more formidable way thus: "At the request of Harry Maughan we supplied 'John Maughan & Son' with the money orders in question. We gave credit to 'John Maughan & Son,' and, if John Maughan is the sole member of the firm, he is liable for that which was supplied to him under his trade name at the instance of his agent, be he partner or servant." The same answer, I think, is open to the defendant. The act was beyond the apparent scope of the agency. Had the money orders been supplied for use in the business carried on, the contention would have been sound, but the sale of money orders is, as I have said, beyond the scope of the business of "general insurance agents," and I do not think the plaintiffs' case is in any



way helped by the fact that the plaintiffs may have thought that John Maughan & Son would have been themselves purchasers of the orders required in their business. If it was intended that the money orders should only be used in the business, the agreement actually signed does not carry out the intention.

The appeal should be allowed and the judgment of Mr. Justice Riddell restored with costs throughout.

MEREDITH, J.A. (dissenting):—The real question, in all such cases as this, is one of “agency,” that is, was there authority in the one to bind the other? It can make no difference that in some cases the finding of authorisation is reached by stopping a denial of it: and so the question here is, had the son authority to make the father liable to the plaintiffs in respect of the “money orders” in question?

Upon that question I have no difficulty in reaching the same conclusion as that arrived at by the Divisional Court, but would not state the mode of reaching the conclusion in quite the same way as the Chancellor has stated the way in which the Divisional Court reached it.

The case seems to me to be a clear one of actual authority, one in which there is no need for the application of any estoppel.

Granted that there was no partnership contract between the father and son, yet there was authority from the father to the son to use the father’s name, and to pledge his credit. What else can the indisputable facts of the case point to; how can they be otherwise explained?

It was natural that the father should desire that the son should succeed in business, and that he should lend his aid for that purpose. The business of the son was carried on in the same office as that of the father for many years. With the father’s knowledge and approval, that business was carried on in the names of father and son, “John Maughan & Son,” just as the father’s business was: the father’s and son’s names appeared upon the business paper of each, and, with their knowledge, in the public directories, as the members constituting the firm of John Maughan & Son.

But it is said that, although that may be quite so, although there may be no escape from the fact of authorisation, that authority extended only to the business of an insurance agent, and that the transaction in question was not one connected with that business.

C. A.  
1910  
DOMINION  
EXPRESS  
Co.  
v.  
MAUGHAN.  
Middleton, J.

C. A.  
1910  
DOMINION  
EXPRESS  
Co.  
v.  
MAUGHAN.  
Meredith, J. A.

Though I am by no means satisfied that the son's authority was so restricted, let it be assumed that it was, yet, in my opinion, and as I have no hesitation in finding, the liability exists.

The use of such "money orders" has now become so common, because of their convenience and utility, that it can hardly be said that they would be out of place in carrying on any business. It would probably be found that they are in use in practically all of the progressive insurance offices—provided the credit of the office is good—in Toronto, in a great number of solicitors' offices, and generally in all important business offices of good standing; as well as, to some extent, to be found among professional men and others not engaged in any business. The fact that in form the holder of them becomes a "sub-agent" of the express company issuing them, as if they were obtained for the purpose of reselling them at a profit, does not alter the fact that perhaps in nine cases out of ten, if not more, there is no intention to resell, or to deal with the "orders" in any way, except in the business of the person acquiring them.

I can have no manner of doubt that the transaction in question was one quite proper and quite common in such businesses as that of the Maughans, father and son, and one of those things regarding which the son had the father's actual authority to use the father's name and pledge his credit.

The very general use of these "money orders" was well proved at the trial, and, as the learned trial Judge remarked, is well known.

I would dismiss the appeal.

---

## [DIVISIONAL COURT.]

HESSEY v. QUINN.

D. C.

1910

July 2.

*Landlord and Tenant—Rent—Excessive Distress—R.S.O. 1897, ch. 342—Nominal Damages—Substantial Damage not Shewn—Claim for Damages for Holding over—Terms of Letting.*

The judgment of OSLER, J.A., 20 O.L.R. 442, was varied by reducing the damages awarded to the plaintiff for excessive distress from \$100 to \$5.

*Held*, that the statute R.S.O. 1897, ch. 342, is confined to irregularities or illegalities arising after the distress, and has no application to the taking of an excessive distress. In the case of an excessive distress there is a breach of the statutory duty to make a reasonable distress only, and some damage must be presumed; but nominal or "nearly nominal" damages only are allowed, unless substantial damage is shewn. As in this case the bailiff took nominal possession only, and did not interfere with the use and enjoyment of the goods, and replevin was granted upon payment into Court of the rent due, there was nothing upon which to found an award of more than nominal damages.

The judgment of OSLER, J.A., as to the terms upon which certain rooms were held by the plaintiff, was affirmed.

APPEAL by the defendant Quinn from the judgment of OSLER, J.A., after the trial, 20 O.L.R. 442.

The action was by a tenant against his landlord and his landlord's bailiff for replevin and for wrongful and excessive distress. The defendant Quinn, the landlord, counterclaimed for rent and for double the yearly value of certain rooms let to the plaintiff, as damages for overholding.

By the judgment appealed against the plaintiff's claim for replevin was dismissed; his claim for excessive distress was allowed with damages assessed at \$100; the defendant Quinn's counterclaim for rent was allowed; and his counterclaim for overholding dismissed.

The appeal was confined to the allowance of damages for excessive distress and the refusal to allow the claim for overholding.

June 23. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and MIDDLETON, JJ.

A. E. H. Creswicke, K.C., for the appellant. The appeal is on two grounds: (1) The learned trial Judge erred in finding that the plaintiff was entitled, under the agreement with respect to the six rooms not included in the lease of the hotel, to hold them during the term of that lease. The evidence and correspondence shew that the plaintiff was merely tenant of these rooms from

D. C.  
1910  
HESSEY  
v.  
QUINN.

month to month, or, at most, from year to year. (2) In any case only nominal damages should be allowed in respect of the alleged excessive distress. The evidence shews that the seizure was a merely formal affair, to which the plaintiff was an assenting party. The damages awarded are really in the nature of a fine inflicted on the defendant, and not based on the true principle of compensation for damage actually suffered: *Piggott v. Birtles* (1836), 1 M. & W. 441, at p. 451; *Chandler v. Douulton* (1865), 34 L.J.N.S. Ex. 89.

*F. G. Evans*, for the defendant Reeve, stated that his client acted under the authority of his co-defendant.

*J. M. Ferguson*, for the plaintiff. The goods seized were altogether out of proportion to the amount of the rent in arrear, as has been found by the trial Judge. I refer to Halsbury's Laws of England, vol. 10, p. 343, where the cases are collected, and where it is laid down that "if no actual damage can be proved the plaintiff must still be awarded damages for the inconvenience caused, and such damages may be substantial." In this case the trial Judge has found that the plaintiff was put to serious inconvenience, and, if punitive damages can ever be awarded, they should be awarded in this case, in which it is evident that the conduct of the defendants has been exceedingly unreasonable. The *Piggott* case, cited by counsel for the appellant, is really an authority in our favour, as also is the *Chandler* case—see the report of the latter case in 3 H. & C. 553; also Mayne on Damages, 7th ed., p. 455. As to the other point, the evidence shews that the six rooms outside of the hotel proper were practically an addition to it, and we rely on the finding of the trial Judge on this point.

*Creswicke*, in reply.

July 2. The judgment of the Court was delivered by MIDDLETON, J.:—The right to damages for excessive distress given by the Statute of Marlbridge was not interfered with or modified by the Imperial statute 11 Geo. II. ch. 19, sec. 19, which provides that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining," the party aggrieved "may recover full satisfaction for the special damage . . . sustained thereby, and no more." These statutes, somewhat modified in



language, but substantially the same, are now found in R.S.O. 1897, ch. 342.

In Foa, 3rd ed., p. 528, it is said that the statute of George applies to actions for excessive distress. *Whitworth v. Smith* (1832), 5 C. & P. 250, is cited as authority for this proposition. All that that case determined was that when some rent was due trover would not lie. The statement is in conflict with other authorities, and erroneous.

The statute in question was passed, as its preamble shews, to relieve landlords from the decisions holding that any irregularity in the proceedings authorised by the statute 2 Wm. & M., leading up to the sale of the things distrained, rendered the landlord a trespasser *ab initio*.

The true view is, that the statute is confined to irregularities or illegalities arising after the distress, and has no application to the taking of an excessive distress.

No doubt, if applicable, special damage would have to be shewn.

*Rodgers v. Parker* (1856), 18 C.B. 112, *Lucas v. Tarleton* (1858), 3 H. & N. 116, *Piggott v. Birtles*, 1 M. & W. 441, and *Chandler v. Doulton*, 3 H. & C. 553, shew that in the case of an excessive distress there is a breach of the statutory duty to make a reasonable distress only, and that some damage must be presumed.

*Black v. Coleman* (1879), 29 C.P. 507, is also in point. But, even when the statute read that in such cases the landlord should be "grievously amerced," nominal or "nearly nominal" damages were allowed, unless substantial damage was shewn.

The cases cited give as indications of real damage: (1) deprivation of the custody and use of the excess taken; (2) deprivation of the power of selling while in custody; (3) extra expense in replevin proceedings.

Upon the evidence in this case, there has been no substantial damage. The bailiff took nominal possession only, and did not interfere with the use and enjoyment of the goods, and as replevin was granted upon payment into Court of the rent due, there is nothing upon which to found an award of more than nominal damages.

In none of the cases is there any indication that exemplary or punitive damages are proper. Had any substantial damage

D. C.

1910

HESSEY

v.

QUINN.

Middleton, J.

D. C.

1910

HESSEY

v.

QUINN.

Middleton, J.

been sustained, substantial and liberal damages might well be awarded.

The damages should be reduced to \$5.

Upon the evidence, it is impossible to disturb the finding of the trial Judge as to the terms upon which the six rooms are held.

The disposition of costs by the trial Judge should stand, but, as success is divided, there should be no costs of the appeal.

---

[DIVISIONAL COURT.]

D. C.

1910

May 16.  
July 2.

RE SCHUMACHER AND TOWN OF CHESLEY.

*Municipal Corporations—Local Option By-law—Voting—Town Clerk—9 Edw. VII. ch. 73, sec. 9—Special Meeting of Council—Good Friday—Municipal Act, sec. 270 (1)—Printing Done by Clerk—Disqualification—Scrutineer—Appointment—Right to Vote in Subdivision where Acting—Certificate—Deputy Returning Officer—Qualification as Voter—Voters “Named” in List—Inquiry as to Qualification—Misnomer—Person Intended—Inability to Mark Ballot—Absence of Declaration of Secrecy—Presence of Unauthorised Electors—Effect on Right to Vote—Entering Names in Poll Book before Polling Day—Irregularity—Appointment of Scrutineers—Time Fixed not Observed—Municipal Act, sec. 342—Saving Clause, sec. 204—Irregularities not Affecting Result.*

Upon a motion to quash a local option by-law:—

*Held*, having regard to the amendment of sec. 351 of the Municipal Act by 9 Edw. VII. ch. 73, sec. 9, that the clerk of a municipality can vote upon the submission of such a by-law to the electors.

2. That the action of the council, unanimous and without objection, in finally passing the by-law at a meeting held on Good Friday, was valid.

*Foster v. Toronto R.W. Co.* (1899), 31 O.R. 1, referred to.

3. That, a special meeting of the council having been held on the 21st March for the purpose of finally passing the by-law and having been adjourned until the 28th March, it was not illegal to pass the by-law at another special meeting called for the 25th March: sec. 270 (1) of the Municipal Act.

4. That the clerk of the municipality was not disqualified by reason of his having published the by-law and done the printing in connection with it, nor because he had printed for pay certain literature in regard to the contest over the by-law for the organised class of electors who were advocating the adoption of it.

5. That the appointment of D. to act as scrutineer in polling subdivision No. 1, the certificate of the clerk that he was entitled to vote in No. 1, and the delivery of both to the deputy returning officer for No. 1, were sufficiently proved; and the clerk's certificate, that D., a scrutineer in polling subdivision No. 1, was qualified to vote in polling subdivision No. 2, on lot 16 West Main, and that this certificate entitled him to vote in polling subdivision No. 1, contained all that the Act required—the words “for or against the by-law” not being necessary.

6. That N., the deputy returning officer in No. 2, whose certificate read, “is a duly qualified tenant in polling subdivision No. 1, and is, therefore, entitled to vote in No. 2,” was properly allowed to vote in No. 2, being “a person claiming to vote as a tenant:” sec. 113.

7. That the real qualification of a voter whose name was on the list for No. 2 and who voted in No. 2, could not be inquired into: 7 Edw. VII. ch. 4, sec. 24.

8. That persons "named" in the voters' list, even if their qualifications were not stated or were not sufficiently stated, were entitled to vote: 7 Edw. VII. ch. 4, sec. 24.

*In re McGrath and Town of Durham* (1908), 17 O.L.R. 514, followed.

9. That Arthur S. Bashford was entitled to vote, as "the person . . . intended to be named" in the voters' list, the name in the list being "Bashford, Geo. S.:" Municipal Act, sec. 112.

*In re Armour and Township of Onondaga* (1907), 14 O.L.R. 606, 608, followed.

10. That persons whose names appeared on the list as "Morgan, Dr.," "Nichols, Mrs.," were entitled to vote—there was no necessity for having the full name.

11. That the objection that a number of persons voted openly without having previously made declarations of secrecy, and voted in the presence of unauthorised electors and persons, should not be given effect to in determining the number of votes for a by-law; the objection does not go to the right to vote.

12. That the entering in the poll books before the day of polling of the names of the persons on the voters' list was irregular, but it could not affect the result, nor the right of any voter to vote.

13. That the fact (if it was a fact) that, although sec. 341 of the Municipal Act was complied with by the council fixing a time and place for the appointment of persons to attend at the various polling places, sec. 342 was not complied with because the head of the municipality did not appoint at the time fixed, was not fatal to the by-law; sec. 342 is a provision "as to the taking of the poll," and so covered by sec. 204, which should be applied.

*Re Bell and Corporation of Elma* (1906), 13 O.L.R. 80, and *Re Kerr and Town of Thornbury* (1906), 8 O.W.R. 451, explained.

14. That, notwithstanding several irregularities, the by-law was saved by sec. 204.

Judgment of MEREDITH, C.J.C.P., affirmed.

MOTION by one Schumacher to quash a local option by-law of the town of Chesley.

May 9 and 16. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court at Toronto.

*J. B. Mackenzie*, for the applicant.

*C. J. Holman*, K.C., for the town corporation.

MEREDITH, C.J. (at the conclusion of the argument):—This case indicates how many pitfalls there are into which municipal officers may fall, and which a party very much interested in opposing legislation such as that which was proposed under the by-law in question, and an astute counsel, can discover; and it is fortunate, therefore, I think, that the Legislature has, by sec. 204 of the Municipal Act, 1903, enacted a wide and sweeping curative provision, to guard against the mistakes and errors of officers, which they knew had so frequently happened in the past and would happen in the future.

There are but two or three of the objections which have been taken which seem to me to present any difficulty.

The first objection is as to the right of the town clerk to vote;

D. C.

1910

RE  
SCHUMACHER  
AND  
TOWN OF  
CHESLEY.

Meredith, C.J.

1910

Re

SCHU-  
MACHER

AND

TOWN OF  
CHESLEY.

and, while the legislation is not in as satisfactory a condition as it might be, it is manifest, I think, what the purpose of the Legislature was in enacting the provision in the Municipal Amendment Act, 1909, which is contained in sec. 9; and I think I must give effect to what was undoubtedly the intention of the Legislature in enacting that provision.

As the law stood before the change was made by 55 Vict. ch. 52 in the method of electing county councillors, a municipal clerk, by what is now sec. 179, was given a casting vote in case of an equality of votes at municipal elections, and was disqualified from voting at any election in his municipality.

When provision was made for the election of county councillors by a direct vote of the electors, it was thought advisable to provide that municipal clerks should not be disqualified from voting at these elections, with which they had nothing to do. It was, therefore, provided, as in substance it is in the Act of 1903, sec. 85, as follows: "The persons qualified to vote at the elections of county councillors shall be the persons qualified to vote at the elections of members of the council of the local municipality and all local municipal clerks, and no others."

That section was repealed by 6 Edw. VII. ch. 35, which did away with the direct election of the members of the county council by direct vote, and went back in a modified way to the method adopted before 55 Vict. ch. 52.

Then, by the statutes of 1909, ch. 73, sec. 9, provision is made that sub-secs. 1 and 2 of sec. 179 are not to apply to voting on by-laws requiring the assent of the electors.

The sub-sections referred to are:—

"(1) In case it appears, upon the casting up of the votes as aforesaid, that two or more candidates have an equal number of votes, the clerk of the municipality (or other person appointed by law to discharge the duties of clerk in case of his absence or incapacity through illness), whether otherwise qualified or not, shall, at the time he declares the result of the poll, give a vote for one or more of such candidates, so as to decide the election for the local municipality.

"(2) Except in such case, no clerk of the municipality shall vote at any local municipal election held in his municipality."

Section 365 of the Consolidated Municipal Act, 1903, pro-



vides: "Where the assent of the electors, or of the ratepayers or of a proportion of them, is necessary to the validity of a by-law, the clerk or other officer shall not be entitled to give a casting vote."

So that, as the law stood prior to 1909, by sub-sec. 2 of sec. 179, the clerk was apparently disqualified from voting at any municipal election held within his municipality, and was also disqualified from giving a casting vote upon a by-law requiring the assent of the electors; and the effect of the repeal, in 1909, of sub-secs. 1 and 2 of sec. 179 was to do away with what apparently the Legislature thought was an unfair thing, his disqualification from voting, as his right to give a casting vote had already been taken away.

It may, no doubt, be argued on the other side, and there is some force in the objection, that the persons entitled to vote on a by-law requiring the assent of the electors are persons qualified to vote at municipal elections, and the clerk is not a person entitled to vote at such an election. However, I give effect to what I think was the plain intention of the Legislature—that the town clerk should be qualified to vote—the general provision of sec. 86 being wide enough to cover all persons—that is, assuming, of course, that he is a qualified voter in other respects.

I disposed practically as the argument proceeded with the question of disqualification of the clerk on account of his having published the by-law and done the printing in connection with it.

It was argued that that was incompatible with his duty as clerk, and that the effect of his having undertaken it was to cause him to cease to be the clerk, and to disentitle him to exercise the powers and perform the functions with which under the Act the clerk is charged.

With that contention I do not agree. While it was, perhaps, an unwise thing for the council to have intrusted this work to the clerk, there is nothing in the doing of the work that brings the case within the principle on which Mr. Mackenzie's objection as to the incompatibility of duties rests.

Then it was objected that the town clerk was disqualified from voting because he had printed certain literature for the "temperance party," for which he was paid or is to be paid, and it was argued that he comes within the section of the Act which disquali-

Meredith, C.J.

1910

RE  
SCHU-  
MACHIE  
AND  
TOWN OF  
CHESLEY.

Meredith, C.J.

1910

RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.

fies a person from voting who has performed services in connection with the election. I do not think that objection is tenable. Section 179 was amended by sec. 8 of ch. 22 of 5 Edw. VII., by adding to it the following sub-section: "(4) No person employed and paid by a candidate to act as scrutineer, or for any other purpose in connection with municipal elections, shall be entitled to vote at such election."

I think there are two grounds upon which this objection fails.

The clerk was not a person employed by a candidate to act as scrutineer or for any other purpose in connection with the election. There was no candidate, and no person occupying the position of candidate, as that expression is used in the Act. Then the temperance organisation is not recognised in any way by the law. It is simply a volunteer, concerned just as any person interested in promoting any by-law or legislation which is desired by a municipality might be concerned. If the temperance party were to be treated as the candidate for the purposes of the election, sec. 247 excludes payments for the fair cost of printing and advertising, and says that they "shall be held to be expenses lawfully incurred." That, I think, only makes it not unlawful for the candidate to spend the money, but does not touch the question of the disqualification with which sec. 179 deals.

I therefore rest my disallowance of this objection upon the ground that the clerk was not employed by a candidate in the sense in which that word is used in sec. 179.

The next question I deal with is that of the voters who voted upon certificates: Durst and Neelin.

Durst was a scrutineer at one of the polling subdivisions, and Neelin was one of the deputy returning officers, and they both voted upon certificates. Several objections are taken to Durst's right to vote. First, it is said that there is no evidence that he produced his appointment at the opening of the poll, and that that was a condition precedent to his right to be present and to vote upon a certificate.

I should have held that, in the absence of evidence to the contrary, it must be assumed that, having been allowed to vote by the returning officer, the appointment was presented to him at the proper time; but there is the evidence, which I have allowed to be put in by the respondents, an affidavit of Durst, that he

had possession of the appointment, and that it was produced to the deputy returning officer before the opening of the poll and left with him. I therefore disallow the objection to Durst's vote.

It is objected to the votes of both Durst and Neelin, that the certificates upon which they voted were not in the form which the statute prescribes, in that they do not mention the property in respect of which the named persons to whom they are given is entered upon the voters' list. I do not think that I ought to hold that a mistake of that kind is sufficient to annul the vote. Both of them were undoubtedly good voters, and had a right to vote upon the by-law; and I am not prepared to hold that a mistake of the officer in the form of the certificate—a mistake which, as Mr. Holman has pointed out, could lead to no improper result—and the failure to insert something which, perhaps, is not of very much use in the certificate, vitiates the votes. I have, therefore, come to the conclusion that the objections taken to them are not maintainable.

Then objection was made to Neil Taylor and Henry Specht because the qualification or nature of the right of the voter to vote was not entered in the voters' list. I do not think that essential. The name appearing in the voters' list, I think, is sufficient.

With regard to the cases of Arthur S. Bashford, who voted as George S. Bashford, and Jean Martha Dobie, who voted as Margaret Dobie, I think there is nothing in the objection as to their votes.

The statute provides that where the returning officer finds the name of the voter or a name apparently intended to be that of the voter, he is to give him a ballot paper, and the expression is used in another section "voter or person intended to be named on the voters' list." I think these votes are good votes.

I disposed as the case proceeded of the objection that a special meeting of the council was called for the final passing of the by-law for the 21st March. At that time some proceedings were going on—I think a motion for an injunction to prevent the council passing the by-law. That meeting was adjourned to the 28th March, and on the 24th March another special meeting was called for the following day, at which all the members of the council were present, and at which the by-law was finally passed.

It is objected that, there having been an adjournment of the

Meredith, C.J.

1910

RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.

Meredith, C.J.

1910

RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.

special meeting until the 28th March, the proceeding taken in the meantime was invalid, and that the by-law was not properly passed at the meeting of the 25th March. No authority was cited for that proposition, and I know of no principle upon which there is any such restriction upon the right of the councillors to act, especially where, as in this case, it was the duty of the council, the by-law having received the assent of the electors, finally to pass it.

Then it is objected that the by-law was finally passed on Good Friday; that Good Friday is a non-juridical day; and, therefore, any act done upon it is void.

Whatever may have been held in the English cases to which Mr. Mackenzie has referred, I am bound by *Foster v. Toronto R.W. Co.* (1899), 31 O.R. 1, to decide that the holding of the meeting on Good Friday, however unwise it may by some be thought to hold it upon that day, did not render the proceeding nugatory.

No doubt the provisions of the Act were not strictly complied with with regard to the illiterate voters. However, it has been held in a recent case, by my brother Riddell, in *Re Ellis and Town of Renfrew* (1910), 1 O.W.N. 710,\* that such mistakes on the part of the deputy returning officers as occurred do not affect the vote.

It is said that a man named Lipsitt acted as scrutineer, and that he was not sworn to secrecy, and that some of these ballots were marked in his presence. The decision in the *Ellis* case covers that point also.

It is objected that Milne was present, but an affidavit is filed in which he swears that he was acting for a candidate and not in connection with the local option by-law, and the objection to his vote, therefore, fails.

Then the last objection taken by Mr. Mackenzie, while it does credit to his ingenuity, is, I think, plainly untenable. I did not quite appreciate the point, it was so fine, when it was first made.

Section 338 provides that "In case a by-law requires the assent of the electors of a municipality before the final passing thereof, the following proceedings shall, except in cases otherwise provided for, be taken for ascertaining such assent:" one of which is (2) that "the council shall, before the final passing of the proposed by-law, publish a copy thereof in some public newspaper published

\* Now reported *ante* 74.



either within the municipality or in the county town, or in a public newspaper published in an adjoining or neighbouring local municipality, as the council may designate by resolution; and the publication shall, for the purpose aforesaid, be continued in at least one number of such paper each week for three successive weeks; and the council shall put up a copy of the by-law at four or more of the most public places in the municipality."

Section 341 provides that "the council shall, by the by-law, fix a time when, and a place where, the clerk of the council which proposed the by-law is to sum up the number of votes given for and against the by-law, and a time and place for the appointment of persons to attend at the various polling places, and at the final summing up of the votes by the clerk respectively, on behalf of the persons interested in, and promoting or opposing the passing of the by-law respectively."

I will assume that compliance with secs. 338 and 341 are conditions precedent to the passing of a by-law requiring the assent of the electors.

Now, the by-law did contain provisions such as are required by sec. 341, and the whole by-law was published for the period prescribed by sub-sec. 2 of sec. 338.

The first reading of the by-law took place on the 9th December, 1909, the voting took place on the same day as the municipal elections, and the by-law was published on the 2nd, 6th, and 10th December, 1909.

The objection is, that by the clause of the by-law inserted in order to comply with sec. 341—fixing the time when the clerk should sum up the votes, etc., and when the mayor was to attend for the purpose of appointing persons to act on behalf of those interested in promoting and those opposing the by-law—the 6th December, 1909, was fixed, and there were not, therefore, between the first publication of the notice, which was on the 2nd of that month, and the time of polling, three weeks; in other words, that the ratepayers had notice for only the short time between these dates of the time when these things would be done, and not three weeks' notice, as it was argued should have been given.

There is nothing in the statute requiring that; and there is nothing to say what time is to be fixed for these purposes. The council published a by-law which contains that provision and

Meredith, C.J.

1910

RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.

Meredith, C.J.

1910

RE

SCHU-  
MACHER

AND

TOWN OF  
CHESLEY.

complies with the statute, and, whatever may be said in the affidavits as to prejudice, I do not believe a word of any such thing. I do not think there could be any prejudice to any one owing to the short time from the first advertisement until the appointments were to be made; and there were, in fact, persons appointed, as I understand it, for all the polling places.

If there were anything in any of the minor objections, I think they are all covered by the curative provisions of sec. 204.

I do not desire to say anything that will have the effect of inducing clerks and municipal officers to be careless in the performance of their duties, but I cannot help saying that it is a most extraordinary thing that the temperance body does not take more care to see that the formalities in connection with the submission of by-laws to the electors are complied with, and that more care is not taken by the persons who are appointed or whose duty it is to attend at the taking of the votes.

There appears to be an absolute disregard of the plain provisions of the statute. It is most unfortunate that this should be the case, and it puts a great deal of labour upon the Courts of Justice.

The costs of the litigation in connection with the by-laws are enormous, and the inconvenience to which people have been put in connection with it is very great, and I sincerely hope that some effort will be made, when such by-laws are submitted in the future, to prevent the utter disregard of the plain directions of the statute which almost invariably takes place.

It is, however, a satisfaction to me to be able to hold that the curative section of the Act may be applied to get rid of the difficulties which otherwise would be created by the failure to comply with the provisions of the Act which has taken place.

It would be an unfortunate thing if the will of the people, expressed even by a majority of a single vote, could be set aside on account of the mistakes or errors of officers in the performance of their duties in connection with the holding of an election.

I have omitted to refer to another objection which I at first thought might have something in it, that the Act requires that the poll book be in blank when the poll opens, and the names of the voters to be entered in it as they vote, but, in taking the vote on this by-law, the names of all the voters were copied from the

voters' list into the poll book, and the clerk, instead of referring to the voters' list and making a mark there to shew that the voter had received a ballot paper, put a tick opposite the name of the voter in the poll book, intended apparently to indicate that the voter had voted.

At first I thought that there was a difficulty arising from this, because if a question arose as to the right of a person to vote, it might be impossible to ascertain whether he had voted, because there was nothing but the tick to indicate who had voted, and nothing under the hand of the deputy returning officer stating what the tick was intended to indicate.

Upon the whole, I have come to the conclusion that the objection cannot prevail, and that it would be reasonable to treat the tick as a mark indicating that the person opposite whose name it appears had voted.

There is an inherent difficulty where, as in this case, a number of by-laws are to be voted on, and the municipal councillors are elected at the same time, owing to there being no provision made for indicating in the poll book on what subject a voter voted. I notice in the poll book a statement as to one voter, that he took the ballot on the local option by-law only, which would seem to indicate that where no such statement was made the voter voted on all questions upon which he was entitled to vote.

I shall take the course which I have usually taken, where there has been gross carelessness on the part of those conducting the election and those promoting the by-law, of refusing to give costs to the successful respondents.

The applicant appealed from the order of MEREDITH, C.J.

June 20 and 21. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. B. Mackenzie*, for the appellant, argued that there was not the necessary three-fifths majority of the electors in favour of the by-law. Exactly three-fifths of the electors who polled their votes were in its favour, but the majority included the vote of the town clerk, and it is submitted that he had no right to vote. Meredith, C.J., thought he had such right under 9 Edw. VII. ch. 73, sec. 9 (O.), but that amendment to sec. 351 of the Municipal

Meredith, C.J.

1910

RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.

D. C.  
1910  
RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.

Act was made with the purpose of reconciling conflicting decisions on another point, and has nothing to do with the present case. The town clerk is also disqualified from voting by reason of the special duties cast upon him (see the Municipal Act, 1903, sec. 177, sub-sec. 6), as he would have in effect to pass on his own qualification, and so to be "a judge in his own cause." Further, the clerk, by accepting a contract for doing the printing in connection with the by-law, could not with propriety make the declaration referred to in sec. 312 of the Act, and virtually vacated his office, so that his acts have no validity. He was acting as town printer, and his holding that office was incompatible with his holding the office of town clerk: Dillon on Municipal Corporations, 4th ed., vol. 1, pp. 309, 310; *The King v. Tizzard* (1829), 9 B. & C. 418; *The Queen v. Douglas*, [1898] 1 Q.B. 560, at p. 563; *The Queen v. Corporation of Bangor* (1886), 18 Q.B.D. 349; *Staniland v. Hopkins* (1841), 9 M. & W. 178. The by-law was improperly given a third reading on the 25th March, as that was Good Friday, and also because the meeting of the council on that day was held pending an adjournment of a former meeting, which adjourned meeting was to be held on the 28th March: Municipal Act, secs. 267, 275; *The Queen v. Payn* (1864), 34 L.J.N.S. Q.B. 59. Even if there were power to call a meeting for Good Friday, could business be legally transacted on a statutory holiday? Reference to the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-secs. 16, 17, sec. 9 (O.), also to sec. 203 of the Municipal Act, and to *Regina v. Murray* (1897), 28 O.R. 549, at p. 551. The learned counsel took a number of other objections to the by-law, which are dealt with *seriatim* in the judgment of Riddell, J. He also referred to the following authorities: *In re Port Arthur and Rainy River Provincial Election* (1907), 14 O.L.R. 345, *per* Meredith, J.A., at p. 358; *Ackers v. Howard* (1886), 16 Q.B.D. 739; *Regina ex rel. Chambers v. Allison* (1865), 1 C.L.J.N.S. 244; *Woodward v. Sarsons* (1875), L.R. 10 C.P. 733, at p. 746 *et seq.*; *Re Bell and Corporation of Elma* (1906), 13 O.L.R. 80; *Re Croft and Town of Peterborough* (1889), 17 O.R. 522, affirmed (1890), 17 A.R. 21; *West Toronto Election Petition* (1871), 5 P.R. 394; *Smith v. Carey* (1903), 5 O.L.R. 203, at p. 208.

C. J. Holman, K.C., for the respondents, was not called upon.



July 2. RIDDELL, J.:—A local option by-law was submitted to the voters of the town of Chesley on the 3rd January, 1910. Of the 440 voters casting their votes, 264 voted for the by-law, exactly the three-fifths required by the statute.

A motion was made against the by-law, which motion was heard by the Chief Justice of the Common Pleas; on the 16th May the motion was dismissed; and the applicant now appeals.

The notice of motion contains some 22 reasons in all, which I shall deal with in the order in which they were argued.

Objection 1. The by-law had not the necessary three-fifths of the electors in its favour. It is said that the clerk of the town voted, and that he had no right so to do—that he was prevented from doing so by being the clerk.

There was much difference of opinion in the Courts upon a similar question, *i.e.*, as to the right of deputy returning officers to vote; and I think the Legislature intended to settle that vexed question and also this when the Act of 1909 was passed.

The R.S.O. 1897, ch. 245, by sec. 141 (1), provides that the by-law, before the final passing thereof, is to have been duly approved of by the electors “in the manner provided by the sections in that behalf of the Municipal Act.” The marginal note here is to R.S.O. ch. 223, secs. 338 *sqq.*; and this section of the Liquor License Act has been always considered to require a vote in the same way and by the same electorate as R.S.O. ch. 223, secs. 338 *sqq.*, including sec. 351. Section 351 makes applicable to such an election “all the provisions of sections 138 to 206 inclusive, except section 179, of this Act.” There was a difference of opinion in the Courts as to the effect of this upon deputy returning officers—we need not go into that question. The Legislature in 1909, 9 Edw. VII. ch. 73, sec. 9, amended sec. 351 by making the exception cover only sub-secs. 1 and 2 of sec. 179. It follows, then, that the Legislature have said that the provision that a clerk shall not vote shall not apply to votings of this character; while they have excluded from the exception the case of deputy returning officer. Whatever else the legislation may mean, it must, I think, certainly mean that clerks can vote at such a voting.

Objections 2, 3, and 4. The by-law was read the third time on the 25th March. A special meeting had been called for the 21st March for the final passing of the by-law—that meeting was

D. C.  
1910  
—  
RE  
SCHUMACHER  
AND  
TOWN OF  
CHESLEY.  
—  
Riddell, J.

D. C.  
1910  
RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.  
Riddell, J.

adjourned to the 28th March. On the 24th March another special meeting was called for the following day, and upon the 25th March, all the members being present, the by-law was given its third reading. Two objections are taken to this: (1) that the 25th March was Good Friday; and (2) that there was no power to call a meeting pending the adjournment of the former.

The statute 6 Edw. VII. ch. 47, sec. 24 (4), makes it the plain duty of the council to pass the by-law; and I am unable to find anything in the statute forbidding the holding of a meeting on Good Friday. Nor is there anything at the common law to prevent such a meeting. At the common law even Sunday was not a day upon which business could not be done—it required statutory provisions for that: 4 Bl. Com. 63, 64. One of these statutes, that of 27 Hen. VIII. ch. 5, prohibited the holding of fairs on Good Friday, also, upon pain of forfeiture of the goods exposed to sale. But the law has not gone further. For example, Courts of Assize are frequently held upon that day, although it is the practice to excuse from attendance all who may have conscientious scruples against every kind of secular business upon that day. This matter is discussed in *Foster v. Toronto R.W. Co.*, 31 O.R. 1, at p. 4, by the Chancellor. While many have a disinclination to work on Good Friday, and it may be that, if any councillor objected on conscientious grounds to the meeting being held, there might have been some ground of complaint, I do not think that the act of the council, unanimous and without objection, can be said to be other than valid, though done on Good Friday. Nor does the fact that a special meeting had been adjourned, and was still, therefore, pending, make any difference. Section 270 (1) gives to the head of every council the right “at any time” to “summon a special meeting thereof,” and makes it his duty to do so when requested as mentioned in the section. No exception is made of the time between the adjournment of any meeting and the time to which the meeting is adjourned. No special form is given for the summoning of a special meeting; and it must be clear that, if all are present and none objects, the special meeting is regular. This disposes also of objections 2, 3, and 4.

Objections 5, 6, and 7 were not pressed.

Objections 8 and 9. The printing of voters' lists, etc., was done by the town clerk. There is no incompatibility in the dual

position of the clerk and printer, such as in *The King v. Tizzard*, 9 B. & C. 418. There a clerk was elected an alderman—the board of aldermen having control over the clerk. It was pointed out that a man cannot be both master and man—the two were incompatible. Nothing of the kind is to be found here, and, while there is an objection to a man trying to serve two masters, there is none to his trying to serve the same master in two capacities.

The High Schools Act, R.S.O. 1897, ch. 293, by sec. 43 makes a trustee *ipso facto* vacate his seat if he enters into any contract, etc., with the board; and a similar provision is found in the Public Schools Act, R.S.O. ch. 292, sec. 100; but nothing of the kind is to be found in the Municipal Act in respect of clerks, etc. Section 80 refers to members of the council only. It is true that “before entering on the duties of his office” he must make and subscribe a solemn declaration “that he has not . . . any interest in any contract with . . . the . . . corporation:” sec. 312. It is unnecessary to consider what would be the effect upon the contract if the clerk entered into one after his taking office—it is sufficient to say that the statute does not void the office.

The same remark applies to the argument that he must be held to have vacated his office by reason of the alleged fact that he printed material for the temperance people.

The learned Chief Justice of the Common Pleas has dealt with this in a wholly satisfactory manner, and I have nothing to add.

This disposes of objection 21.

Objection 10. This is directed against the vote of the clerk already dealt with in objection 1.

Objection No. 11. W. G. Durst lived in polling subdivision No. 2, having property in both No. 1 and No. 2. An appointment was drawn up for him to act as scrutineer in polling subdivision No. 2, but a change was made in pencil to No. 1, and then the mayor signed the appointment—this change was made at the request of one Armstrong. The clerk swears that he gave this to Durst at his request; and Durst swears that he received it and a certificate from the clerk and delivered both to the deputy returning officer in polling booth for polling subdivision No. 1, on the morning of the election. This is sufficient proof. The appointment is regular—the certificate signed by the clerk

D. C.

1910

RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.

Riddell, J.

D. C.  
1910  
—  
RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.  
—  
Riddell, J.

(returning officer) reads: "This is to certify that W. G. Durst, a scrutineer in polling subdivision No. 1, is qualified to vote in polling subdivision No. 2, on lot 16 west main, and this certificate entitles him to vote in polling subdivision No. 1." This certificate contains all the Act requires, unless the omission of the words "for or against the by-law" after the word "vote" makes the certificate incomplete—and that could not be contended. It will be seen that the Act does not require the interest of the voter in the property to be stated: 3 Edw. VII. ch. 19, sec. 347 (1). Upon the production of this certificate, Durst was entitled to vote: sec. 347, (2). In view of the express statement of Durst, it is too much to ask us to hold that the appointment was in fact left on file in the clerk's office, as he at one point in his examination thinks (Q. 598).

J. J. Neelin was the deputy returning officer in polling subdivision No. 2. His certificate read: "Is a duly qualified tenant in polling subdivision No. 1, and is, therefore, entitled to vote in No. 2." Here, not the property, but the "other qualification," is given, viz., that Neelin is a tenant—and the rest of the certificate shews that that means a tenant qualified to vote. He is "a person claiming to vote as a tenant," whose case is provided for by sec. 113—the oath does not specify the property, and I can see no difficulty, in case of suspicion, in requiring the voter to take an oath. I am of opinion that this objection fails. Neelin is objected to also under objection 14, but the objection fails, for reasons apparent when we come to consider that objection.

Objection 12. George B. Nicol voted in a polling subdivision where he had no property as owner. His name, however, appears on the voters' list for polling subdivision No. 2; he voted in No. 2; and we cannot inquire into his real qualification: 7 Edw. VII. ch. 4, sec. 24.

Objection 13. A number of persons voted openly without having previously made declarations of inability. This objection goes not to the right to vote, and cannot here be considered, for reasons given in *Re Ellis and Town of Renfrew*, ante 74. This kind of objection will be mentioned again under objection 17.

Objection 14. Henry Specht is on the voters' list as "Henry Specht, farmer, Pl. S." The objection is made that this is not sufficient. The Act (1907) 7 Edw. VII. ch. 4, sec. 24, says that the voters' list "shall . . . be final and conclusive evidence"



of the right of "all persons named therein . . . to vote . . . except" certain cases not of importance here. This was held to apply to voting of this nature and to such applications as this in *In re McGrath and Town of Durham* (1908), 17 O.L.R. 514. It cannot be successfully contended that Henry Specht was not "named" in the voters' list. I may add it is sworn that he is a freeholder.

Neil Taylor thus appears in the voters' list: "Taylor, Neil, gentleman, lot 180, con. or street E. Dobie." Whatever his qualification, he is "named" in the voters' list.

Objection 15. Arthur S. Bashford was allowed to vote—no name "Arthur S. Bashford" appears on the voters' list, but there is found "499 Bashford, Geo. S., labourer, lot V. Pl. Park, M.F. & O." The assessor swears that this should have been Arthur S. Bashford, and that Bashford was at the time of the election a freeholder assessed for \$300, and that Arthur S. Bashford is the person he intended to place upon the list, there being, as he verily believes, no such person as "Geo. S. Bashford." Bashford could take the oath set out in sec. 112 of the Act of 1903; he therefore had the right to vote, as he was "the person . . . intended to be named" in the voters' list: *In re Armour and Township of Onondaga* (1907), 14 O.L.R. 606, at p. 608.

The same remarks apply to Mrs. Jean Martha Dobie, whom the assessor called Margaret Dobie, by a like mistake.

The deputy returning officer was right in giving these persons ballot papers, under sec. 165, having "ascertained that the name of such person or a name apparently intended therefor is entered upon the voters' list. . . ."

Objection 16. A person described thus, "648, Morgan, Dr., surgeon, lot 36, E. McGraw, M.F. & T.," was allowed to vote. This was Henry E. Morgan, a surgeon; and I see no necessity for having the full name. Henry E. Morgan was the person intended—his name is Morgan, and the vote is well enough. So also Mrs. Nichols should have been Elspeth Nichols, but she could not be deprived of her vote for the reason simply that she was described as "790, Nichols, Mrs., widow, lot 161, W. River, owner."

Objection 17. A number of illiterates voted without oaths of secrecy and in the presence of unauthorised electors and persons.

I have in *Re Ellis and Town of Renfrew* considered the case

D. C.  
1910  
RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.  
Riddell, J.

D. C.  
1910  
RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.  
Riddell, J.

of illiterates, and have decided that the formalities laid down for voting by illiterates are not conditions precedent to the right to vote—and that, upon such inquiries as the present, irregularities not affecting the right to vote should not be considered in determining the number of votes for a by-law, whatever effect such irregularities may have in another point of view. I think *Re Ellis and Town of Renfrew* well decided, and adhere to the views there expressed.

Objection 18. The names of those on the voters' list had been improperly entered in the poll books before the day of polling.

This is, of course, irregular, but it could not affect the result of the election, and could not affect the right of any voter to vote.

Objection 19 is not pressed.

Objection 20. Unauthorised persons were allowed to be present when electors were voting. This is covered by the case of *Re Ellis and Town of Renfrew*—the right to vote is not affected by this irregularity; and that is all that can be considered in this part of the present inquiry.

Objection 21 is not pressed, nor is objection 22.

An objection was taken to the by-law in the matter of fixing the time for appointing agents, etc. The statute provides, sec. 341, that "the council shall, by the by-law, fix . . . a time and place for the appointment of persons to attend at the various polling places. . . ." This was done, and a time and place fixed, but it is said that at the time so fixed the head of the municipality did not so appoint. The argument is that this is fatal and the decision in *Re Kerr and Town of Thornbury* (1906), 8 O.W.R. 451, is relied upon. There Mr. Justice Anglin based his judgment upon the decision of a Divisional Court in *Re Bell and Corporation of Elma*, 13 O.L.R. 80. In the *Elma* case the by-law itself had not contained a clause fixing the time and place. Mr. Justice Anglin refused to quash the by-law upon that ground, but on appeal a Divisional Court composed of Falconbridge, C.J., Britton and Mabee, J.J., held that this omission was fatal, and quashed the by-law. The report says, p. 81: "At the close of the argument the judgment of the Court was delivered by Falconbridge, C.J., holding that the requisites of secs. 341 and 342, which were positive directions of the statute, had not been complied with; that the curative sec. 204 did not apply, as an essential part of the by-law, which

was more than an irregularity, had been omitted. . . .” The judgment was oral, and must be read in connection with the argument “that a time and place must be fixed under secs. 341 and 342 of the Municipal Act, 1903, 3 Edw. VII. (O.)” The Court did not decide and did not intend to decide that, if sec. 341 was satisfied, an irregularity in the manner of carrying out the provisions (or its entire omission) of sec. 342 would be fatal—it was the omission of “an essential part of the by-law” that was in the contemplation of the Court. And this was as Mr. Justice Anglin understood it, I think: he says in 8 O.W.R. at p. 451: “I have ascertained from the Chief Justice of the King’s Bench that the ground of decision was that the provisions of sec. 341 of the Municipal Act are imperative, and that an omission in a by-law . . . to fix a time and place for the appointment of persons to attend the various polling places . . . is fatal.” And the learned Judge says, p. 452: “If failure to comply with the provisions of sec. 341 would be fatal, then I think failure to comply with the provisions of sec. 342 must also be fatal.” This is the *ratio decidendi* of the *Thornbury* case. But, with much respect, I do not think that, granting that 341 is obligatory and cannot be cured by sec. 204, the same rule must apply to sec. 342—the latter, in my view, may well be considered a provision “as to the taking of the poll,” and so covered by sec. 204; whereas sec. 341 is not. The judgment may, however, be supported upon the other ground mentioned on p. 452, *i.e.*, the date of the last of the debentures.

I am of opinion that, if the provisions of sec. 204 would otherwise be effective, the fact that sec. 342 was not lived up to (if this be a fact) does not exclude the operation of sec. 204.

Notwithstanding the several irregularities, I am unable to say that the learned Chief Justice is wrong in holding that sec. 204 is effective in saving the by-law.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed that the appeal should be dismissed with costs.

D. C.  
1910  
—  
RE  
SCHU-  
MACHER  
AND  
TOWN OF  
CHESLEY.  
—  
Riddell, J.

## [DIVISIONAL COURT.]

D. C.

REX V. FARRELL.

1910

July 2.

*Liquor License Act—Magistrate's Conviction for Selling Liquor to Minor—7 Edw. VII. ch. 46, sec. 8—Appeal to County Court Judge—Trial de Novo—Onus—Absence of Evidence that Person Apparently a Minor and as to Knowledge of Accused—Proof of Age—Effect of Magistrate Disbelieving Evidence.*

The defendant, a licensed hotel-keeper, was convicted by a police magistrate, under 7 Edw. VII. ch. 46, sec. 8, introducing a new provision for sec. 78 of the Liquor License Act, R.S.O. 1897, ch. 245, for unlawfully giving, selling, or supplying intoxicating liquor to a youth who was apparently or to the knowledge of the defendant under the age of twenty-one years. The youth was before the magistrate, and testified that he was under twenty-one; there was no other evidence as to his age, and no evidence as to the knowledge of the defendant. Under sec. 118 of the Act, the defendant appealed to a County Court Judge, who made an order quashing the conviction. No fresh evidence was taken before the Judge; the written depositions taken by the magistrate were (by agreement) put in; and the Judge had not the supposed minor before him:—

*Held*, by a Divisional Court, upon a further appeal, by leave of the Attorney-General, under sec. 120 of the Act, that the conviction was properly quashed, there being no evidence before the Judge that the defendant knew that the youth was under twenty-one, and none that he was apparently under twenty-one.

The appeal to the Judge under sec. 118 is in effect a trial upon the merits, the burden of proof is not upon the appellant, and the findings of the magistrate are irrelevant.

*Seemle, per RIDDELL, J.*, that the age of the supposed minor could not be proved by his own testimony; and also that the whole effect of disbelieving evidence is to wipe out the evidence; and, although the magistrate might disbelieve the evidence of the defendant that he thought the youth was twenty-one years old in appearance, he could not find that this evidence proved the opposite.

APPEAL by the License Inspector for the North Riding of the County of Oxford, in pursuance of the certificate of the Attorney-General for Ontario, from an order of the Judge of the County Court of the County of Oxford quashing a conviction of the defendant made by the Police Magistrate for the City of Woodstock.

The Police Magistrate convicted the defendant, who was a licensed hotel-keeper, of selling or supplying intoxicating liquor to Charles B. Cowley, a person who was apparently, or to the knowledge of the defendant, under the age of twenty-one years.

Cowley gave evidence before the magistrate, and stated that he was under eighteen years of age. There was no other evidence as to his age or as to the knowledge of the defendant or of the defendant's son, the bar-tender by whom the liquor was supplied.



June 21. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. R. Cartwright*, K.C., for the appellant, argued that the witness Cowley could give evidence as to his own age, and referred to *The King v. Turner*, [1910] 1 K.B. 346, at p. 362.

*James Haverson*, K.C., for the defendant, argued that the whole matter was open to the County Court Judge, who was entitled to give his decision upon the evidence just as if the case had been tried before him in the first instance. He referred to *The Queen v. McNutt* (1900), 4 Can. Crim. Cas. 392, at p. 398, and to *The King v. Boomer* (1907), 15 O.L.R. 321.

*Cartwright*, in reply.

July 2. BRITTON, J.:—The defendant was a licensed hotel-keeper at Woodstock. On the 13th January, 1910, the appellant laid an information on oath before the Police Magistrate at Woodstock, charging the defendant with selling or otherwise supplying liquor to nine persons specially named, or to some or one of them, who were apparently, or to the knowledge of the defendant, under the age of twenty-one years; Charles B. Cowley was one of the nine.

The Police Magistrate convicted the defendant of selling or supplying liquor on the 17th December, 1909, to Charles B. Cowley, who, as it is said, was apparently, or to the knowledge of the defendant, under the age of twenty-one years.

The evidence of Cowley was perfectly frank and clear, that he purchased from the bar-tender in the defendant's hotel liquor, was supplied with it, and that, so far as he knew, or could testify to his own age, he was under eighteen years of age. His height was about 5 ft. 10 in., and he weighed 154 lbs. Haight, one of the party, was over 6 feet high.

There was no evidence that Cowley was, either apparently or to the knowledge of either Farrell—father or son—under the age of twenty-one years.

The offence created by sec. 78 of the Liquor License Act, R.S.O. 1897, ch. 245, is that of selling or supplying liquor to a person apparently or to the knowledge of the person selling or supplying the liquor under the age of twenty-one years.

Section 78 above cited was repealed, but substantially re-enacted by 7 Edw. VII. ch. 46, sec. 8.

D. C.  
1910  
—  
REX  
v.  
FARRELL.

D. C.  
1910  
—  
REX  
v.  
FARRELL.  
—  
Britton, J.

An appeal was taken to the County Court Judge. The learned County Court Judge, in the case of such an appeal, must in reality try the case. It so happens in this case that the parties consented to the evidence before the Police Magistrate, as taken down in writing, being received. Upon that evidence there is nothing to shew that Cowley was ever seen by the Judge. There was no evidence either as to Cowley's being apparently under age or as to the knowledge of the Police Magistrate or of the Judge of Cowley's being under age.

The learned Judge has quashed the conviction. He has found in favour of the defendant. Whether that decision be considered as one upon the merits on the evidence before him, or as a decision that there was not sufficient evidence before the Police Magistrate to convict, it should be considered as final.

The whole point of the inquiry seems to have been missed.

It was apparently taken for granted by the Police Magistrate that, if Cowley was in fact under the age of twenty-one, that was sufficient. That is not the offence. Had that been the charge, and had there been statutory enactment to warrant such a charge, then, under the circumstances, the evidence of Cowley as to his reputed age might have made a case. It is not necessary to determine that.

Upon the evidence before the Police Magistrate and before the County Court Judge, the judgment is right, and the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree that the appeal ought to be dismissed with costs.

RIDDELL, J.:—Patrick Farrell was charged before Mr. Ball, Police Magistrate for Woodstock, upon an information that he "did unlawfully give, sell, or supply liquor to one Charles B. Cowley, who was apparently or to the knowledge of the said Patrick Farrell under the age of twenty-one years . . ." Farrell was convicted, and appealed under sec. 118 of R.S.O. 1897, ch. 245, to the Judge of the County Court of the County of Oxford, who gave judgment quashing the conviction with costs.

An appeal is brought under sec. 120 by the prosecutor, the Attorney-General having given the proper certificate, and we are now to "hear and determine the said appeal:" sec. 120, *ad fin.*

The Act of 1902, 2 Edw. VII. ch. 33, never came into force, and therefore the absolute prohibition made by sec. 161 of that Act never became effective. The statutory provision is now (1907) 7 Edw. VII. ch. 46, sec. 8, introducing a new provision for sec. 78 of R.S.O. 1897, ch. 245. The section prohibits selling to two classes of minors: (1) those apparently under twenty-one; and (2) those to the knowledge of the vendor under twenty-one.

Upon the appeal before the County Court Judge it was agreed that "the evidence taken before the Police Magistrate should be used instead of calling the witnesses;" and the written depositions were put in.

The Act R.S.O. 1897, ch. 245, by sec. 118 provides (8) that the practice and procedure upon the appeal, and all the proceedings thereon, shall be governed by the statute R.S.O. 1897, ch. 92: this statute, ch. 92, by sec. 13 provides that the Judge "shall hear and determine the charge or complaint . . . upon the merits . . . and if the person charged or complained against is found guilty, the conviction shall be affirmed . . . ." It is plain, and it has been the uniform view of practitioners, that the so-called appeal to the County Court Judge is not really an appeal but a trial; that the County Court Judge must himself find the appellant guilty before the conviction can be affirmed—the wording of the section is, I think, conclusive.

The burden of proof is the same before the County Court Judge as before the magistrate—the burden of proof is not upon the appellant, as it would be in the case of an appeal properly so-called, to prove that the Court below is wrong—the findings of the Court below are wholly irrelevant, and it is for the County Court Judge to determine the complaint himself, upon the evidence brought before him.

*The Queen v. McNutt*, 4 Can. Crim. Cas. 392, may be referred to upon this point.

The only evidence of the age of the so-called minor is his own—he says he "will be eighteen years of age on the 27th January, 1910." I have great doubt—more than doubt—whether this testimony is proof of the minority of the age of the witness—and I have heard it ruled more than once, by Judges of great ability and experience, that a witness cannot be allowed to testify to his own age. But, suppose that to be got over, there is no evidence that the accused

D. C.  
1910  
—  
REX  
v.  
FARRELL.  
—  
Riddell, J.

D. C.  
1910  
REX  
v.  
FARRELL.  
Riddell, J.

knew that the young man was under twenty-one, and none that he was apparently under twenty-one. It may be that the young man appeared to the Police Magistrate to be under twenty-one; we have no evidence of that; and, in any case, we are not determining an appeal from the Police Magistrate. I do not at all hold that the Police Magistrate had the right to determine, without evidence and upon his own view, that the young man was apparently under twenty-one. There is no necessity of expressing an opinion upon that point.

*The King v. Turner*, [1910] 1 K.B. 346, 362, may be looked at on the point.

There was nothing but some writing before the County Court Judge, and he could not see the person—for anything that appeared before him he may have looked thirty or thirty-five. And, although he might disbelieve, as the Police Magistrate did, the evidence of Farrell, who said: "They are all big enough to go to work; I think they are all twenty-one years old in appearance;" he could not hold that this evidence proved the opposite: *Gilbert v. Brown* (1910), 15 O.W.R. 673, at p. 679, 1 O.W.N. 652, 654. The whole effect of disbelieving evidence is to wipe out the evidence.

The conclusion of the County Court Judge being correct, we are not concerned with his reasons: *Rex v. Boomer*, 15 O.L.R. 321; see p. 322.

The appeal should be dismissed with costs.

---



## [DIVISIONAL COURT.]

EARL V. REID.

D. C.

1910

July 7.

*Negligence—Collapse of Building—Injury to Person in Neighbouring Building—Finding of Jury—Res Ipsa Loquitur—Independent Contractor—Duty and Responsibility of Owner—Evidence.*

Every owner of a building is under a legal obligation to take reasonable care that his building shall not fall in the street or upon his neighbour's land and injure persons lawfully there; and he is liable for injuries caused by the failure on his part to exercise reasonable care; the degree of care required must depend upon the circumstances of each case.

The defendant R. made a lease to S. of a four-storey building for twenty-five years from the 1st August, 1907, which lease contained an agreement by S. to make alterations and improvements in the building, one of which was the removal of between fifty and sixty feet of a section of the wall which divided the first floor of the main building into two compartments, and the substitution therefor of three iron columns supporting steel beams against the wall above, and resting on plates imbedded in cement on top of the wall below. S. was allowed to take possession of the first floor about the 10th June, 1907, for the purpose of making the alterations, R. remaining in possession of the rest of the building. S. engaged a firm of contractors to do the work, and it was done under the supervision of an architect. The work of putting in the steel beams and iron columns was completed on the 12th July, 1907, and the shoring which had been used to support the wall until the columns were in place, was removed. On the 16th July the building collapsed, and the easterly wall fell against B.'s building to the east (separated from it by a lane), and the plaintiff, B.'s clerk, was injured. In an action to recover damages for her injuries, the jury found that they were caused by the defendants' negligence, which consisted "in placing the iron columns in a defective wall:"—

*Held*, that the facts of the case brought it within the rule of evidence *res ipsa loquitur*, and that, in the absence of any explanation by the defendants, the presumption must be that the building fell because of some defect in the plan or design for the alterations or by reason of some negligence in making the alterations; and whether or not the negligence was that found by the jury, it was not incumbent upon the plaintiff to shew.

*Held*, also, that the possession and control by S. conferred no greater rights and imposed no greater responsibilities upon him than would be conferred and imposed upon any other independent contractor employed by R. to make the alterations, who on his part might sub-contract the work, as S. did; and that R. was responsible for the injuries caused by the collapse of the building, notwithstanding that the negligence to be presumed was that of S. or his architect or the sub-contractors or some one employed by them; when R. contracted with S. for the alterations, he owed to the plaintiff and the other occupants of the adjoining land a special duty of such a nature that he could not by delegating its performance to another escape liability for its non-fulfilment.

*Bower v. Peate* (1876), 1 Q.B.D. 321, *Dalton v. Angus* (1881), 6 App. Cas. 740, and *Penny v. Wimbledon Urban District Council*, [1899] 2 Q.B. 72, applied and followed.

Judgment of LATCHFORD, J., affirmed.

APPEAL by the defendant Reid from the judgment of LATCHFORD, J., in favour of the plaintiff, upon the finding of a jury.

The following statement of the facts is taken from the judgment of TEETZEL, J.:—

D. C.  
1910  
EARL  
v.  
REID.

The defendant Reid is the owner of a four-storey brick building, comprising two premises known as Nos. 197 and 199 Dundas street, in the city of London. As originally constructed, a brick wall, about seventeen inches thick, divided the two premises from foundation to roof. Many years ago three arch-shaped openings (the exact size of which is not disclosed by the evidence) were made in the section of this wall which divided the ground floor, for the purpose of converting the two stores into one. Subsequently these openings were closed by the defendant Reid, not by restoring the solid brickwork, but by a wall, about four inches thick, on either side, on a line with the surface of the original wall, leaving a hollow space about eight inches wide between the two.

On the 29th April, 1907, Reid entered into a lease with one Smyrles of the whole of the main building for twenty-five years from the 1st August, 1907, which lease contains an agreement by Smyrles in the following words: "Lessee agrees that he will, forthwith after possession of the said premises is given, proceed to make the alterations and improvements to the said building set out in the annexed plan, at his own expense, and complete the said improvements without delay. And it is understood and agreed that, upon the expiration or sooner termination of this lease, the said improvements and additions shall become the property of the lessor."

One of the alterations indicated on the plan, which was prepared by an architect employed by Smyrles, was the removal of between fifty and sixty feet of that section of the wall above referred to which divided the first floor of the main building into two compartments, and the substitution therefor of three iron columns supporting steel beams against the wall above, and resting on plates, thirteen or fourteen inches square, imbedded in cement on top of the wall below.

By verbal arrangement between Reid, who occupied the first floor above No. 197, and a tenant who occupied the first floor above No. 199, Smyrles was allowed to take possession of that floor about the 10th June, 1907, for the purpose of making the alterations.

Smyrles engaged Kernohan & Wilson, a firm of contractors, who are also defendants in this action, to do the work, but the contract between them does not appear in evidence.

The work of putting in the steel beams and iron columns was completed on the 12th July, 1907, and, either on that day or on the

15th July, the shoring which had been used to support the wall until the columns were in place, was removed.

The easterly wall of Reid's building is an outside wall, and faces on a lane which divides it from the building of one Brewster, in which the plaintiff was on the 16th July, 1907, employed as a clerk. On the afternoon of that day, as described by the witness Hammett, Reid's building "went down in a wedge-shape in the centre and crushed out the walls," and the easterly wall fell against Brewster's building, crushing it in, whereby the plaintiff received the injuries sued for.

At the close of plaintiff's case, counsel for both defendants moved for a nonsuit, which was only granted to the defendants Kernohan & Wilson.

In answer to questions submitted, the jury found that the plaintiff's injuries were caused by the defendants' negligence, which consisted "in placing the iron columns on a defective wall," and assessed the damages at \$500, for which amount judgment was given by the trial Judge.

December 23, 1909. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.K.B., TEETZEL and SUTHERLAND, JJ.

*G. S. Gibbons*, for the defendant Reid. This defendant had nothing to do with the alterations which were in progress when the accident occurred, except that he consented to their being made. If he is guilty of negligence at all, it can only be through the act of the contractors, to whom a nonsuit was granted at the trial. It was to them that the work was intrusted of placing the iron columns, which the jury found to be the cause of the accident. [MEREDITH, C.J., stated that he thought the maxim *res ipsa loquitur* applied.] The case was not left to them in that way, and their finding is specific that the negligence consisted "in placing the iron columns on a defective wall." No expert testimony was adduced, and the evidence is insufficient to support the finding of the jury. *Valiquette v. Fraser* (1907), 39 S.C.R. 1, and *Cutter v. Hamlen* (1888), 147 Mass. 471, were referred to. The defendant's ownership of the property does not imply liability to the plaintiff, such as might be implied from being in occupation or control of the premises: *Reedie v. London and North Western R.W. Co.* (1849), 4 Ex. 244, at p. 251;

D. C.  
1910  
EARL  
v.  
REID.

D. C.  
1910  
EARL  
v.  
REID.

*Cameron v. Young*, [1908] A.C. 176. The alterations, which included the placing of these iron columns on the wall below, were made by the tenant in possession at his own expense, and the defendant was to receive no benefit from them till the expiry of the lease for twenty-five years. The case is similar to one in which repairs have been made under a covenant: *Nelson v. Liverpool Brewery Co.* (1877), 2 C.P.D. 311. If any one is liable for the accident, it is the tenant Smyrles, or the persons whom he employed to do the work, and, even if the defendant were in Smyrles's position, all he would be bound to do would be to employ a skilled architect and competent contractors: *Hall v. Duke of Norfolk*, [1900] 2 Ch. 493; *Quinn v. Crimmings* (1898), 42 L.R.A. 101; Pollock on Torts, 8th ed., p. 80. In cases such as *Bower v. Peate* (1876), 1 Q.B.D. 321, and *Dalton v. Angus* (1881), 6 App. Cas. 740, there was either a statutory obligation, or a right to support from adjoining land, elements which are not present in the case at bar. The following authorities were also referred to: Pollock on Torts, 8th ed., p. 520; Hudson on Building Contracts, 3rd ed., p. 786; Beven on Negligence, 3rd ed., p. 420; *Welfare v. London and Brighton R.W. Co.* (1869), L.R. 4 Q.B. 693; *Blake v. Woolf*, [1898] 2 Q.B. 426; *Malone v. Laskey*, [1907] 2 K.B. 141.

*J. F. Faulds*, for the plaintiff. At the time of the accident Smyrles's tenancy had not begun, and he was in the position of a mere licensee. The defendant Reid was, therefore, in possession, and, whether so or not, was liable. No expert testimony is necessary in this connection, as we have the evidence of eye-witnesses of the fact. The burden of proof is on him to shew that the accident was not caused by his negligence, and the maxim *res ipsa loquitur* is applicable. The defects in the wall were latent, and known to the defendant, though not to the architect. The following cases were referred to: *Roberts v. Mitchell* (1894), 21 A.R. 433; *White v. Jameson* (1874), L.R. 18 Eq. 303; *Hole v. Sittingbourne and Sheerness R.W. Co.* (1861), 6 H. & N. 488, per Pollock, C.B. at p. 497; *Pickard v. Smith* (1861), 10 C.B.N.S. 470; *Black v. Christchurch Finance Co.*, [1894] A.C. 48; *Hughes v. Percival* (1883), 8 App. Cas. 443; *Penny v. Wimbledon Urban District Council*, [1899] 2 Q.B., 72; *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335; *Holliday v. National Telephone Co.*, [1899] 2 Q.B. 392; *Wheelhouse v. Darch* (1877), 28 C.P. 269; *West v. Bristol Tramways Co.*, [1908] 2 K.B. 14; *Great Western*



*R.W. Co. v. Braid* (1863), 1 Moo. P.C.N.S. 101; *Ferrier v. Trépannier* (1895), 24 S.C.R. 86.

*Gibbons*, in reply, referred to *Hughes v. Percival*, *supra*, per Lord Blackburn, at pp. 446, 447.

July 7. The judgment of the Court was delivered by TEETZEL, J. (after stating the facts as above):—Other than proving the existence of the openings and the method of supporting the superstructure of the wall by the beams and columns, and the fact that the first indication of the impending fall was the crumbling down of some bricks in the easterly half of the ground floor from the angle formed by the ceiling and the division wall, which was instantly followed by the collapse of the wall, as described by Hammett, the plaintiff gave no evidence to account for the accident.

No expert evidence was given to shew that to do the work in the manner indicated on the plan, having regard to the three openings filled up in the manner described, would injure the stability of the wall, nor was any witness called to prove any specific act of negligence by the defendant or those doing the work.

The plaintiff's counsel relied upon the application of the maxim *res ipsa loquitur* to establish the defendant's negligence, and no evidence was offered by the defendant to rebut any presumption of negligence or in any way to account for the disaster.

Besides disputing the application of the maxim, and that there was any evidence of negligence proper to submit to a jury, Mr. Gibbons, both on his motion for nonsuit and on the appeal, argued that Reid could not be held liable because: (1) there was no privity between the plaintiff and him, nor any duty owed by him to the plaintiff; (2) that, the work not being done by him, but by Smyrles, the tenant, who employed an independent contractor to do the work under the supervision of an architect, for the negligence of either of them Reid would not be liable; and (3) that there was no evidence from which it could be held that the work was either dangerous or attended with dangerous consequences to Reid's neighbours or the public, if not properly done.

As to the cause of the mishap, I do not think it is necessary to determine whether or not that found by the jury is supported by the only evidence offered, because I think the maxim *res ipsa loquitur* clearly applied, and could be invoked by the plaintiff against Reid

D. C.  
1910  
EARL  
v.  
REID.  
Teetzel, J.

D. C.

1910

EARL

v.

REID.

Teetzel, J.

as owner of the building, for the law cast upon him a duty to exercise reasonable care to prevent it falling upon her.

I think it is the plain duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to persons lawfully upon adjoining lands. In other words, every owner of a building is under a legal obligation to take reasonable care that his building shall not fall in the street or upon his neighbour's land and injure persons lawfully there.

While the owner cannot be charged for injuries caused by inevitable accident, the result of *vis major* or of the wilful act or negligence of some one for whom he is not responsible, he is liable for injuries caused by the failure on his part to exercise reasonable care.

If authority is needed for this proposition, reference may be had to *Firth v. Bowling Iron Co.* (1878), 3 C.P.D. 254; *Mullen v. St. John* (1874), 57 N.Y. 567; *Mahoney v. Libbey* (1877), 123 Mass. 20; *Kirby v. Boylston Market Association* (1859), 14 Gray 249; Shearman & Redfield's Law of Negligence, 5th ed., sec. 701a; judgment of Littledale, J., in *Laughner v. Pointer* (1826), 5 B. & C. 547, at p. 560; and of Baron Parke in *Quarman v. Burnett* (1840), 6 M. & W. 499, 510; also *Roberts v. Mitchell*, 21 A.R. 433, at p. 439.

The degree of care required must depend upon the circumstances of each case. Now, in this case was not the very nature of the work which Reid authorised and required his tenant to perform just such as should require more than ordinary precautions to be taken to prevent such a calamity as that which happened? He was requiring between fifty and sixty feet of the support of the upper half of the centre wall to be removed, and, if it should be allowed to fall, was it not probable that a parallel outside wall, such as the easterly wall was, would be toppled over on his neighbour's property? It seems to me that the character of the work was such as to import danger, not only to the occupants of the building, but to the neighbours to the east, unless special care was taken to countervail the law of gravitation, not only in the process of taking out the foundation, but in inserting and maintaining the substituted support.

The plaintiff was lawfully upon the adjoining land of her employer, and entitled to have the same care exercised towards her by the defendant as her employer would be entitled to.

Such being the duty of the owner, is this not a case, therefore, having regard to the extent and extraordinary character of the collapse, that the burden should be cast upon the owner to account for an occurrence which presumably could not happen without the negligence of some one? Buildings properly constructed and properly maintained do not fall without some adequate cause.

In *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, the plaintiff suffered injuries from a number of bags of sugar falling upon him while, in the discharge of his duty, he was passing in front of the defendants' warehouse situate in their dock. Chief Justice Erle said: "There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." And Brett, J., observed in *Gee v. Metropolitan R.W. Co.* (1873), L.R. 8 Q.B. 161, 175, that "where something happens which would not happen if ordinary care and skill were used, the happening of that is evidence on which a jury may find that there has been negligence on the part of the defendants."

In *Kearney v. London Brighton and South Coast R.W. Co.* (1870), L.R. 5 Q.B. 411, affirmed in (1871), L.R. 6 Q.B. 759, as the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers, on which one of the girders rested, and injured the plaintiff; a train had passed just previously; and it was held that, the defendants being bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence in the defendants.

Other cases where the maxim has been applied are noted in Clerk & Lindsell on Torts, 3rd ed., p. 467 *et seq.* See also *Sangster v. T. Eaton Co.* (1894), 21 A.R. 624; affirmed in *T. Eaton Co. v. Sangster* (1895), 24 S.C.R. 708.

I think the facts of this case bring it within the rule for applying the maxim, and that, in the absence of any explanation by the

D. C.

1910

EARL

v.

REID.

Teetzel, J.

D. C.

1910

EARL

v.

REID.

Teetzel, J.

defendant, the presumption must be that the building fell either owing to some defect in the plan or design for the alterations or by reason of some negligence in making the alterations; and whether or not the negligence was that found by the jury, it was not incumbent upon the plaintiff to shew.

Assuming, therefore, that the law did cast upon the defendant a duty to use reasonable care to prevent his building falling upon the plaintiff, and assuming also that, in the circumstances, negligence should be presumed, is the defendant relieved from liability because it was shewn that the work was being done for the tenant Smyrles by an independent contractor under the supervision of an architect?

In the first place, it is to be observed that Smyrles was only in possession of the first floor for the purpose of making the alterations which Reid had stipulated for under the lease, the term and right to possession under which did not begin until the 1st August. At the time of the accident Reid was himself in sole possession of the two upper storeys.

It seems to me, therefore, upon the evidence, that the possession and control by Smyrles conferred no greater rights and imposed no greater responsibilities upon him than would be conferred and imposed upon any other independent contractor employed by Reid to make the alterations, and who on his part might sub-contract the work, as was done by Smyrles. In other words, *quoad* the provisions for alterations and what was done thereunder, the lease should be treated as an agreement by the owner with an independent contractor to make alterations in his building. Smyrles had in no sense succeeded to Reid's rights and duties regarding the control and maintenance of the building as a whole.

The chief point for determination seems to me to be whether this is a case in which Reid is responsible, notwithstanding that the negligence to be presumed is that of Smyrles or his architect or the sub-contractors or some one employed by them.

Now the question of the liability of an owner or employer to third parties for negligence of an independent contractor has been the subject of much judicial discussion, and certain principles have been laid down by the highest Courts in England and this country, which clearly fix the responsibility under certain circumstances.

In *Bower v. Peate*, 1 Q.B.D. 321, the defendant employed a contractor to pull down and rebuild his house, which adjoined the



plaintiff's house. Owing to some defect in the precautions taken by the contractor, the plaintiff's house was injured. It was urged that the defendant had employed the contractor to do a lawful act in a lawful way and was not answerable for his negligence. The defendant was held liable, and the following broad principles laid down by the Court, at p. 326: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

This decision has been followed in many subsequent cases, and was notably approved in *Dalton v. Angus*, 6 App. Cas. 740, in which Lord Blackburn, at p. 829, says: "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

These two cases may, therefore, be accepted as settling the law on this question; but, in applying it to a concrete case, the first important question to determine is, whether a duty exists of such a nature that it cannot be escaped by employing a competent third person to execute the work in question.

The right of the plaintiff to retain her judgment in this case, therefore, depends upon whether the undisputed facts establish that, when the defendant contracted with Smyrles for the alterations to his building, he owed to her and the other occupants of the adjoining land a duty of such a nature that he could not by delegating its performance to another escape liability for its non-fulfilment.

I think the case comes within the principle stated by Lord Blackburn, in *Dalton v. Angus*, *supra*, for that the defendant, in addition to the general duty which as owner of the building he owed to his neighbours, as pointed out in the cases above cited on the

D. C.  
1910  
EARL  
v.  
REID.  
Tetzels, J.

D. C.

1910

EARL

v.

REID.

Teetzel, J.

question of the application of the rule *res ipsa loquitur*, also, under the circumstances of this case, when he authorised the alterations in his building to be made, owed a special duty to the plaintiff and others who might be within the reach of its fall, to see that proper precautions were taken to prevent its falling.

I also think that, as between an owner of land who is putting up, demolishing, or altering buildings thereon, and his neighbours, the principle should be applied which has been adopted in many cases holding that where a person who authorised work of a hazardous nature in or near a highway, to the injury of a member of the public using the highway, cannot rid himself of liability for negligence in performing the work by shewing that such negligence was that of an independent contractor employed by him. I refer to such cases as *Kirk v. City of Toronto* (1904), 8 O.L.R. 730, which followed *Penny v. Wimbledon Urban District Council*, [1898] 2 Q.B. 212, [1899] 2 Q.B. 72, wherein Bruce, J., stated the law to be as follows: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor:" [1898] 2 Q.B. at p. 217.

The latest case which I have found in our own Courts upon the subject of the liability for negligence of an independent contractor is *Valiquette v. Fraser*, 39 S.C.R. 1, where Justices Davies and MacLennan laid down the law to be that the owner of a building in course of construction owes to those whom he invites into or upon it the duty of using reasonable care and skill in order to have the property and appliances upon it intended for use in the work fit for the purposes which they were to be put to. Such duty is not discharged by the employment of a competent architect to prepare plans for the building and a competent contractor to attend to the work of construction.

The English cases, in addition to those cited above, are collected and the principles deducible therefrom pointed out in the article on Negligence edited by Mr. Beven in the *Encyc. of the Laws of England*, vol. 9, pp. 559 to 562.

Assuming that the relationship between the appellant and

Smyrles at the time of the accident was that of owner and independent contractor, I am of opinion that the principles enunciated in *Bower v. Peate*, *Dalton v. Angus*, and *Penny v. Wimbledon Urban District Council*, *supra*, are applicable to the facts of this case and support the judgment; but, in the absence of any evidence of the appellant to shew that the accident was unavoidable or attributable to the act of some person not under his control or to *vis major*, the liability of the appellant may, I think, well be rested on the rule of law stated by Littledale, J., in *Laugher v. Pointer*, 5 B. & C. 547, at p. 560, cited with approval by Baron Parke in *Quarman v. Burnett*, 6 M. & W. at p. 510, and also adopted by Jessel, M.R., in *White v. Jameson*, L.R. 18 Eq. 303, "that in all cases where a man is in possession of fixed property he must take care that his property is so managed that other persons are not injured, and that whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others."

As already pointed out, Smyrles's tenancy had not begun when the accident happened, and he was doing the work which was in progress when it happened by permission of the appellant, and was in the position, not of a tenant in possession, but of a licensee brought on the premises by the appellant.

The judgment must be affirmed and the appeal dismissed with costs.

D. C.

1910

EARL

v.

REID.

Teetzel, J.

## [DIVISIONAL COURT.]

D. C.

1910

July 7.

## POWLEY V. MICKLEBOROUGH.

*Negligence—Injury to Property by Overflow of Water—Flats in Building Tenanted by Different Persons—Cause of Action—Tort—Assignment—Parties—Assignor and Assignee Joined as Plaintiffs.*

The defendants were *held* liable in damages for injury to the plaintiffs' premises by water overflowing from a tap negligently left running in the lavatory in the defendants' premises upon the floor above the plaintiffs' in the same building, both plaintiffs and defendants being tenants of the owner of the building.

*Per CLUTE, J.*:—The fair inference from the evidence was that the defendants, by themselves or their servants, who were allowed to use the lavatory, negligently left the tap running, and caused the injury complained of.

*Per MIDDLETON, J.*:—Where the claim is made against a tenant occupying an upper flat, *prima facie* he is liable for the escape of water from a tap left open; the onus is upon him to establish facts freeing him from liability.

*Childs v. Lissaman* (1904), 23 N.Z.L.R. 945, specially referred to.

The action was originally brought by the assignees of the persons who were tenants of the lower premises when the damage was done, but the assignors were added as plaintiffs:—

*Held*, that, both parties being before the Court, a right of action was vested in either one or the other, and the effect of the assignment was immaterial. Judgment of the County Court of York reversed.

APPEAL by the plaintiffs from the judgment of the Senior Judge of the County Court of the County of York dismissing the action with costs.

The action was brought by the George Powley Paper Company Limited to recover damages for injury to property by water from the premises above, occupied by the defendants, coming upon the premises occupied by George Powley & Co. on the 25th March, 1909.

In June, 1909, the George Powley Paper Company Limited was incorporated, and acquired and took over the assets of George Powley & Co. The latter firm was added as a party plaintiff.

The Judge of the County Court held that neither of the plaintiffs could recover.

June 9. The appeal was heard by a Divisional Court composed of CLUTE, SUTHERLAND, and MIDDLETON, JJ.

*W. A. Proudfoot*, for the plaintiffs. The trial Judge found against the plaintiffs, on the ground that the cause of action was not assignable, under *McCormack v. Toronto R.W. Co.* (1907), 13 O.L.R. 656, but that case is not applicable to an action such as the present, where both parties are tenants, and the assignor and assignee are both before the Court. He referred on this point to



*Williams v. Protheroe* (1829), 5 Bing. 309, at p. 314; *Dickinson v. Burrell* (1866), L.R. 1 Eq. 337, at p. 342; *Dawson v. Great Northern and City R.W. Co.*, [1905] 1 K.B. 260; *Yates v. Whyte* (1838), 4 Bing. N.C. 272, at p. 284; *Henson v. Blackwell* (1845), 4 Hare 434. [The Court intimated that they would hear the other side on this point.]

A. C. *McMaster*, for the defendants, argued that, if the assignment of the cause of action was void on grounds of public policy, the equitable doctrine contended for by the appellants should not be allowed to prevail, and referred to *Reiffenstein v. Hooper* (1875), 36 U.C.R. 295. [The Court having intimated that their opinion was against the defendants on their technical defence, counsel proceeded to argue the case on the merits.] The defendants are only liable if they, or their servant, in the course of his employment, left the tap running. It cannot be assumed that the damage was caused by one of the defendants' employees, and in such a case it is not allowable to make a guess: *Jones v. Grand Trunk R.W. Co.* (1880), 45 U.C.R. 193. [MIDDLETON, J., said there was a great difference between that case and the one at bar, as in the *Jones* case the damage was caused by a foreign substance, while here it was caused by a tap, which was an ordinary part of the premises in the custody of the defendants.] *Stevens v. Woodward* (1881), 6 Q.B.D. 318, shews that in such cases the employer is not liable if his employee turns on the tap against orders, or after hours, or anything of that kind: see Beven on Negligence, 3rd ed., p. 580. Even if the defendants are liable for the tap running, the damages claimed are not the natural result of the overflow.

*Proudfoot*, in reply. In the *Stevens* case it was said that the decision would have gone the other way if the damage had been caused by the act of a housemaid, and not that of a clerk. He referred to *Ruddiman & Co. v. Smith* (1889), 60 L.T.R. 708; *Killion v. Power* (1866), 51 Pa. St. 429; *Scott v. London and St Katherine Docks Co.* (1865), 3 H. & C. 596; *Cataraqui Bridge Co. v. Holcomb* (1861), 21 U.C.R. 273; *O'Brien v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 345; *Sangster v. T. Eaton Co.* (1894), 25 O.R. 78.

D. C.

1910

POWLEY

v.

MICKLE-  
BOROUGH.

July 7. CLUTE, J.:—At the time of the damage complained of George Powley & Co. were the tenants and occupiers of a part of a

D. C.  
1910  
POWLEY  
v.  
MICKLE-  
BOROUGH.  
Clute, J.

flat in a building on Front street, in the city of Toronto; the defendants were tenants and occupiers of a flat above that occupied by George Powley & Co. It is alleged that the defendants on the 25th March, 1909, negligently turned on, and left turned on during the night, a water tap in the premises occupied by them, and large quantities of water escaped from such tap and flowed down on the premises of the flat below, occupied by George Powley & Co., causing damage.

In June, 1909, George Powley & Co. were incorporated as the George Powley Paper Company Limited, who acquired and took over the assets of George Powley & Co.

It was urged that the plaintiffs were not entitled to recover, upon the ground that, a tort not being assignable, the new company could not sue, and that George Powley & Co., who were added as party plaintiffs, could not sue, because Powley, on his examination, had admitted that all the assets of the firm had been transferred to the new company. This was the view taken by the learned Judge in the Court below, relying on the case of *McCormack v. Toronto R.W. Co.*, 13 O.L.R. 656. He also held that, Powley having sworn that the firm had received value from the incorporated company for this very cause of action, the firm were not entitled to sue.

I think that this position is entirely untenable. Both parties are before the Court, and a right of action is vested in either one or the other; it is immaterial which.

It is, I think, clear that the principle laid down in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, is subject to qualification in a case of this kind. In *Blake v. Woolf*, [1898] 2 Q.B. 426, it was held that, if the person claiming to be compensated has consented to the dangerous matter being brought on the defendant's land, he cannot recover. In that case the plaintiff had taken premises and accepted his supply of water from the defendants' cistern, and he was taken to have assented to water being kept on the premises by the defendants, and it was there held that wilful default and neglect must be shewn to entitle the plaintiff to recover. See also *Anderson v. Oppenheimer* (1880), 5 Q.B.D. 602.

In *Stevens v. Woodward*, 6 Q.B.D. 318, the plaintiffs occupied premises beneath the offices of the defendants, who were solicitors. One of the defendants had a room in the offices, and in it was a lavatory for his exclusive use, and his orders to his clerks were that

no clerk should come into his room after he left it. A clerk went into the room to wash in the lavatory after his employer had left, turned the tap on, and left it running. It was held that the act of the clerk was not within the scope of his authority or incident to the ordinary duties of his employment, and that there was no evidence of negligence for which the defendants were liable. Lindley, J., said: "I do not see on what principle the defendants are to be held liable for the act of a man who trespasses in their wash-room and leaves their tap running. The evidence shews that a clerk was the trespasser after his master had left." Grove, J., referring to the assumption of the Recorder that there was an implied liability on the defendants until the contrary was proven, says: "If, however, that was removed by uncontradicted evidence shewing the implication to have been a mistake, as it would have been if the defendants had shewn that a stranger, some friend of one of the clerks, had come in and washed his hands in the lavatory and had left the stop-cock open, surely these facts would have disposed of the *prima facie* liability."

In *Childs v. Lissaman* (1904), 23 N.Z.L.R. 945, the facts were very like the present. There a chemist occupied a shop on the ground floor of a hotel. Both the chemist and the hotel-keeper were tenants of the owner of the whole building. A tap was left open in the bath-room and overflowed, causing damage. The evidence shewed that no one from outside could have had access to the bath-room at the time, and that the tap must have been turned on either by the appellant's children or by a servant or by a boarder. It was there held that the onus was upon the appellant to prove that it had not been turned on by one of his children or servants, and that, as he had not proved that, he must be held for the neglect to turn it off.

In the present case it was clearly established—indeed it was not disputed—that the water came from the defendants' floor above, through a crack in the concrete floor.

The plaintiffs called a witness in the defendants' employ who stated that he found the tap running in the lavatory. The lavatory was one which the employees were in the habit of using; the water was running over the top of the basin upon the floor, and through the crack to the premises below. He did not say who left the tap running. It appeared that the servants of the city had turned off

D. C.  
1910  
POWLEY  
v.  
MICKLE-  
BOROUGH.  
Clute, J.

D. C.  
1910  
POWLEY  
v.  
MICKLE-  
BOROUGH.  
Clute, J.

the water at five o'clock in the afternoon, and turned it on again some time during the night—about eleven o'clock, it is said. It is also in evidence that there was a door on the lavatory, but it was never locked, and that any person could go in there. No witnesses were called for the defence; and I think the amount of damages proven was \$303.

The fair inference to be drawn from the evidence, in my opinion, is that the defendants, by themselves or their servants, who were allowed to use the lavatory in question, negligently left on the tap, which overflowed and caused the injuries complained of.

This is a case where it seems unnecessary to refer the matter back for trial, as all the facts are before the Court.

The judgment of the Court below should be set aside, and judgment entered for the plaintiffs for \$303, with costs here and below.

SUTHERLAND, J.:—I agree.

MIDDLETON, J.:—Upon the argument it was plain that the judgment of the Court below could not stand upon the ground upon which the learned Judge had placed it. The assignor and assignee were both before the Court as plaintiffs, and the effect of the assignment is, therefore, quite immaterial. The right of action against the wrong-doer must be vested in either one or the other, and their respective rights are quite immaterial.

We reserved judgment to consider the question of liability.

All the cases are collected and most satisfactorily dealt with in the New Zealand case *Childs v. Lissaman*, 23 N.Z.L.R. 945.

When the claim for damages is made against the landlord, and the water pipes are placed upon the premises for their more convenient enjoyment, the landlord is not liable unless negligence is shewn: *Anderson v. Oppenheimer*, 5 Q.B.D. 602. If the claim is made against a tenant occupying an upper flat, *prima facie* he is liable for the escape of water from a tap left open. The onus is upon him to establish facts freeing him from liability. In *Stevens v. Woodward*, 6 Q.B.D. 318, the defendant escaped by shewing that the tap was interfered with by the wrongful act of a servant who had been forbidden to use the lavatory. In *Ruddiman & Co. v. Smith*, 60 L.T.R. 708, the defendant failed to escape when it appeared



that the negligent clerk was using the lavatory in the course of his employment.

The appeal should be allowed, and judgment entered for \$303, the admitted amount of the damages, with costs.

D. C.

1910

POWLEY

v.

MICKLE-  
BOROUGH.

Middleton, J.

---

[IN THE COURT OF APPEAL.]

NETTLETON V. TOWN OF PRESCOTT.

C. A.

1910

July 8.

*Municipal Corporations—Maintenance of Lock-up House—Duty of Corporation to Prisoner—Lack of Proper Heating—Negligence—Injury—Constable—Caretaker—Corporation Acting as Deputy of the Crown—Respondeat Superior.*

The plaintiff was confined in a lock-up house provided and maintained by the defendants, a town corporation. He alleged that during his confinement the lock-up house was not kept properly warm, and that exposure to the cold brought on a serious illness, and he claimed damages for negligence. During the time of the plaintiff's detention the lock-up house was in charge of M., the chief constable of the town, appointed by the council, and L., the caretaker of the house, appointed by the council, who was also a constable under M.:

*Held*, affirming the judgment of a Divisional Court, 16 O.L.R. 538, that the defendants were not liable.

*Per* GARROW, J.A., that the distinction between the liability of a municipal corporation for the consequences of its acts when acting as a deputy for the Crown or the general government, and when it represents only the interests of the inhabitants within its local jurisdiction, is clearly drawn; this case belonged to the former class; the rule *respondeat superior* did not apply; and the result would not be different even if L. were regarded solely as caretaker, and not as constable.

*Per* MEREDITH, J.A., that the defendants owed no legal duty to the plaintiff regarding the lock-up house or its maintenance.

APPEAL by the plaintiff from the judgment of a Divisional Court, 16 O.L.R. 538, dismissing the action, which was brought to recover damages for injury sustained by the plaintiff, while a prisoner confined in a lock-up or place of detention owned and established by the Municipal Corporation of the Town of Prescott, the defendants, owing, as alleged, to the negligence of the defendants, or their servants, in omitting to keep the lock-up reasonably warm.

The action was tried before MULOCK, C.J.Ex.D., and a jury, at Brockville. The jury answered certain questions put to them, but in such a way that the trial Judge considered that the findings were inconsistent and irreconcilable; and he therefore entered judgment for neither party, saying that the result was a mistrial.

A Divisional Court composed of BOYD, C., MAGEE and MABEE,

C. A.  
1910  
NETTLETON  
v.  
TOWN OF  
PRESCOTT.

JJ., held (MABEE, J., dissenting), upon motions by both parties for judgment, notwithstanding the findings of the jury and the conclusion of the trial Judge, that the plaintiff had no cause of action against the defendants, and therefore dismissed the action, but without costs. The appeal was from this judgment.

April 28. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A., and SUTHERLAND, J.

*J. A. Hutcheson*, K.C., for the plaintiff. The maxim *respondeat superior* is applicable here. The defendants, by by-law, established the lock-up and placed it in charge of their chief constable. They appointed Lee caretaker of the municipal building. It was the duty of Lee to attend to the heating of the lock-up, not as constable, but as caretaker of the building and servant of the defendants. Even if Lee was not acting as servant of the defendants so as to make them liable for his negligence, they are still liable. Section 520 of the Municipal Act, 3 Edw. VII. ch. 19 (O.), authorises municipalities to establish and maintain lock-up houses. This a municipality is not bound to do, and, if it does so, it is exercising its corporate functions as distinguished from its so-called governmental functions, and, having undertaken to do so, it assumes the obligation of taking reasonable care of the health of the inmates of the lock-up: *Hesketh v. City of Toronto* (1898), 25 A.R. 449, at p. 455; *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, at p. 110; *Crawford v. Beattie* (1876), 39 U.C.R. 13, at p. 31; *Lambert v. Great Eastern R.W. Co.* (1909), 79 L.J.K.B. 32, [1909] 2 K.B. 776; *Eddy v. Village of Ellicottville* (1898), 35 N.Y. App. Div. 256; *Lewis v. City of Raleigh* (1877), 77 N.C. 229; *Shields v. Town of Durham* (1895), 116 N.C. 394.

*J. B. Clarke*, K.C., for the defendants. The judgment of the Divisional Court ought to be sustained, for the reasons given therein. There was no negligence on the part of the defendants. The plaintiff's contention that Lee had charge of the heating in his capacity of caretaker of the municipal building and a servant of the defendants, and that the doctrine of *respondeat superior* applies, should not prevail. The defendants, not being liable for the supposed damp, cold, or unsanitary condition of the lock-up, cannot be liable for negligence of their servant in respect of the same matters. In maintaining the lock-up the defendants were exer-

cising their corporate powers, not for the benefit of the inhabitants, but for the benefit of the community at large, and in respect of such matters civil responsibility does not attach to the municipality: *McSorley v. Mayor, etc., of the City of St. John* (1882), 6 S.C.R. 531, at p. 548; *McCleave v. City of Moncton* (1902), 32 S.C.R. 106; *Schmidt v. Town of Berlin* (1894), 26 O.R. 54, at p. 58; *Kelly v. Barton* (1895), 26 O.R. 608, at p. 623; *Butler v. City of Toronto* (1907), 10 O.W.R. 876; *Stanbury v. Exeter Corporation*, [1905] 2 K.B. 838, at pp. 841, 843; *Gibson v. Young* (1900), 21 N.S.W.L.R. 7, at p. 12; *Davidson v. Walker* (1901), 1 N.S.W.S.R. 196; *Mains v. Inhabitants of Fort Fairfield* (1904), 99 Me. 177; *Tindley v. City of Salem* (1884), 137 Mass. 171; *McManus v. Inhabitants of Weston* (1895), 164 Mass. 263, at p. 270; Beven on Negligence, 3rd ed., vol. 1, pp. 326, 329.

C. A.  
1910  
NETTLETON  
v.  
TOWN OF  
PRESCOTT.

July 8. GARROW, J.A.:—Appeal by the plaintiff from the judgment of a Divisional Court, Mabee, J., dissenting, dismissing the action. The facts fully appear in the case as reported in 16 O.L.R. 538.

The judgment of the Court was delivered by the learned Chancellor, who so fully and satisfactorily dealt with the whole subject that, agreeing as I do with his conclusions, I have but little to add.

The distinction between the liability of a municipal corporation for the consequences of its acts when acting as a deputy for the general government, or, according to the British theory, for the Crown, in matters relating to the general public good, and when in the smaller field of local affairs, it represents only the interests of the inhabitants within its local jurisdiction, is clearly drawn in the cases to which the learned Chancellor refers, to which I would like to add an instructive case from the Court of Appeal for the State of Virginia, *City of Richmond v. Long's Administrators* (1867), reported in 17 Grattan 375, where a similar conclusion was arrived at in a very well reasoned judgment.

In the former class, in which, in my opinion, this case belongs, the rule *respondeat superior* does not apply. Nor do I understand Mabee, J., who dissented, to have proceeded upon a different view of the law, but rather upon the view that the defendants are responsible for the conduct of Lee as the janitor of the building in which was situated the lock-up in which the plaintiff was confined.

C. A.  
1910  
NETTLETON  
v.  
TOWN OF  
PRESCOTT.  
Garrow, J.A.

What creates the difficulty, the only one, I think, in this case, is the circumstance that Lee, in addition to being janitor, was also a constable, and appears to have acted as the deputy of the chief constable, Mooney, who was the keeper of the lock-up.

In the statement of claim Mooney and Lee are bracketed together, the one as chief constable, the other as assistant constable, and both as servants of the defendants. It was Lee who first told the plaintiff that Mooney had a warrant for his arrest, and Lee, according to the plaintiff's evidence, had a key of the part of the prison in which the plaintiff was confined, and "came down once or twice to see me, to see how I was getting on," which was no part of his duty, or even, one would think, of his opportunities, if he was acting merely as janitor or caretaker. Under these circumstances, the plaintiff cannot complain if he is held to the language of his pleading, and Lee treated, as indeed he seems to have been, not merely as the janitor of the building, but the deputy of Mooney, the keeper of the lock-up. At the same time I am of the opinion that the result should not be otherwise even if Lee is to be regarded solely in his other character, as mere caretaker. The defendants did not cause the imprisonment. They had supplied a proper enough prison, with appliances to heat it sufficiently. No one disputes that. And it was the duty of the keeper of the prison to see that these appliances were, if necessary, used. Mooney visited the prisoner as late as midnight of the night in question, and was, therefore, in a position to see and to know whether the prison was or was not sufficiently heated, having regard to the temperature of the night. And, if he failed in his duty, the result cannot, under the circumstances, be made to fall upon the defendants.

The appeal should be dismissed with costs.

MEREDITH, J.A.:—The plaintiff's great obstacle lies at the threshold of his case, and is, I think, an insurmountable one. If it could be overcome, it would, I also think, be comparatively plain sailing, for him, to success. But what legal duty did the municipality owe to him regarding the "lock-up house" or its maintenance?

If the Legislature had, for the benefit of persons to be confined in it, provided that the municipality should erect and maintain such a building, the duty would, I think, have existed; a duty sufficient to support this action; but there is no such legislative



provision. The council of the municipality were merely, by legislation, given power to establish, maintain, and regulate lock-up houses for the detention and imprisonment of persons sentenced, under any by-law of the council, to imprisonment for not more than ten days, and of persons detained for examination upon a charge of having committed any offence, and of persons detained for transmission to any common gaol or house of correction, either for trial or in the execution of any sentence.

The power is not conferred for the benefit of the person imprisoned, but for the preservation of the peace, and in aid of the due administration of criminal and penal justice.

The plaintiff was in no sense under the control of the municipality; he was in the custody of a peace officer, who also was in no sense subject to any control of the municipality, regarding his custody of the prisoner. The prisoner was not charged with any offence against any by-law of the municipality, nor, indeed, with any offence committed within, or near to, the municipality, but with a crime committed in some other far-distant place.

In my opinion, this action cannot be maintained, and, therefore, the appeal should be dismissed.

MOSS, C.J.O., MACLAREN, J.A., and SUTHERLAND, J., concurred.

C. A.  
1910  
NETTLETON  
v.  
TOWN OF  
PRESCOTT.  
Meredith, J.A.

## [IN THE COURT OF APPEAL]

C. A.

1910

July 8.

RE KARRY AND CITY OF CHATHAM.

*Municipal Corporations—Power to Regulate Victualling Houses—Municipal Act, sec. 583 (34)—Sunday Closing By-law—Reasonable Restraint—Enforcement of Sunday Observance.*

A city by-law provided that all eating houses should be closed on Sunday between 2 p.m. and 5 p.m. and also from 7.30 p.m. on Sunday to 5 a.m. on Monday:—

*Held*, MEREDITH, J.A., dissenting, a valid by-law, as a regulation authorised by sec. 583 (34) of the Municipal Act, and not unreasonable or oppressive.

*City of Toronto v. Virgo*, [1896] A.C. 88, distinguished.

Order of BOYD, C., 20 O.L.R. 178, affirmed.

*Per* MEREDITH, J.A., that the by-law ought to have been quashed, for the reason that it was not passed for the purpose of regulating victualling houses, but for the purpose of compelling the better observance of the Lord's day, a subject quite beyond the power of the council.

APPEAL by James Karry, owner of a restaurant business, from the order of BOYD, C., 20 O.L.R. 178, refusing to quash by-law No. 369 of the City of Chatham, which provided that every victualling house, ordinary, and houses where fruit, oysters, clams, or victuals were sold, to be eaten therein, within the limits of the city, should be closed and kept closed for all business purposes on every Sunday between the hours of 2 p.m. and 5 p.m., and also from 7.30 p.m. on Sunday to 5 a.m. on Monday, and that no eatables or refreshments should be supplied therein within such hours.

April 28. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*J. M. Ferguson*, for the appellant. The council of the respondents, purporting to act under sec. 583, clause 34, of the Consolidated Municipal Act, 3 Edw. VII. ch. 19 (O.), had no power to pass the by-law in question, since the by-law is not a regulation but a prohibition: *City of Toronto v. Virgo*, [1896] A.C. 88. The by-law is unreasonable and oppressive, and was not passed in the best interests of the public. The by-law was not passed for the purpose of regulating victualling houses, but for the purpose of compelling the better observance of the Lord's day, a subject beyond the power of the council. The power of regulating given by sec. 583 does not include prohibiting the carrying on of lawful business in certain hours. Its object is to prevent the occurrence of a nuisance. This by-law was not passed to prevent the occurrence of a nuisance,

but at the request of the restaurant-keepers other than the appellant. This distinguishes this case from *In re Campbell and City of Stratford* (1907), 14 O.L.R. 184. I refer also to *Calder and Hebble Navigation Co. v. Pilling* (1845), 14 M. & W. 76; *In re Barclay and Township of Darlington* (1854), 12 U.C.R. 86; *Baker v. Municipal Council of Paris* (1853), 10 U.C.R. 621.

*H. L. Drayton*, K.C., for the respondents. The by-law in question is valid, and *intra vires* the corporation: Municipal Act, 1903, sec. 583, clause 34. The fact of the petition being presented requesting the passage of the by-law shews that the by-law was not unreasonable or oppressive: *Re O'Meara and City of Ottawa* (1886), 11 O.R. 603, at p. 607; Biggar's Municipal Manual, ed. of 1900, p. 330; *Salt v. Scott Hall*, [1903] 2 K.B. 245, at p. 249; *Slattery v. Naylor* (1888), 13 App. Cas. 446. This by-law is "regulating" within the meaning of sec. 583, and is not prohibitive: *Re Cribbin and City of Toronto* (1891), 21 O.R. 325; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *In re Campbell and City of Stratford*, 14 O.L.R. 184. The right to regulate does not depend on the question of nuisance or no nuisance, but in any event a nuisance was created in this case by constant repetition of illegal sales on the Lord's day. Reference also to *In re Greystock and Municipality of Otonabee* (1855), 12 U.C.R. 458; *State v. Freeman* (1859), 38 N.H. 426.

July 8. MACLAREN, J.A.:—This is an appeal by the applicant Karry, a restaurant-keeper of Chatham, from a judgment refusing to quash a by-law of that city, which enacted "that every victualling house, ordinary, and houses where fruit, oysters, clams, or victuals are sold to be eaten therein, and all other places for lodging, reception, refreshment or entertainment of the public" (except licensed hotels) should be closed; and no eatables or refreshments supplied, on Sunday between 2 p.m. and 5 p.m. and from 7.30 p.m. to 5 o'clock on Monday morning.

The by-law purported to be passed under sec. 583 (34) of the Municipal Act, which authorises the council to pass by-laws "for limiting the number of and regulating" such houses.

The question is: "Is this by-law a 'regulation' authorised by the statute?"

It was strongly argued on behalf of the applicant that it was not a regulation but a prohibition; and the case of *City of Toronto*

C. A.  
1910  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.

C. A.  
1910  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.  
Maclaren, J.A.

v. *Virgo*, [1896] A.C. 88, was relied upon as an authority for this proposition. An examination of the by-law and judgment in that case, however, shews that there are marked distinctions between the two by-laws. As pointed out at p. 93, the real question there was whether, under a power to pass by-laws "for regulating and governing" hawkers, the council might prohibit them from plying their trade at all, in a substantial and important portion of the city, no question of any apprehended nuisance being raised. It was laid down that the regulation and governance of a trade might involve the imposition of restrictions on its exercise, both as to time, and to a certain extent as to place, where such restrictions were, in the opinion of the public authority, necessary to prevent a nuisance or for the maintenance of order; but the by-law was held to be *ultra vires* because its effect was practically to deprive the residents of what was admittedly the most important part of the city of the privilege of buying their goods of, or of trading with, the class of traders in question. In other words, the by-law was bad on account of its preventing a class of traders from profitably carrying on their business in the city, when the statute contemplated that they should be allowed to carry on their business there.

It would appear from the judgment that the word "govern" is taken as being synonymous with "regulate."

The words "regulate" and "regulation" have been construed in a number of cases in our own Courts with reference to municipal by-laws on the same or kindred subjects.

In *Baker v. Municipal Council of Paris*, 10 U.C.R. 621, under a statute authorising councils to regulate inns and houses of public entertainment, a rule in a by-law that bar-rooms should be kept closed from 11 p.m. to 4 a.m. and all day Sunday, was upheld.

In *In re Greystock and Municipality of Otonabee*, 12 U.C.R. 458, a by-law, under the same statute, requiring all bar-rooms to be closed at 10 p.m. and kept closed all day Sunday, was held to be reasonable and a good enactment.

In *In re Campbell and City of Stratford*, 14 O.L.R. 184, a by-law, under the same section as the present 583 (34), was upheld by Mabee, J., whose decision was affirmed by a Divisional Court. It enacted that no licensed eating house in Stratford should be open between 1 a.m. and 6 a.m. nor on Sunday after 7 p.m. This case being precisely in point, reference may be had to the reasoning and to the authorities cited.



I am of opinion that the principle laid down by the Judicial Committee in *Hodge v. The Queen*, 9 App. Cas. 117, is strongly in favour of the validity of the present by-law. Under the Liquor License Act, R.S.O. 1887, ch. 181, the License Commissioners were authorised to pass resolutions "for regulating the taverns and shops to be licensed." The commissioners for Toronto passed a resolution or regulation, in relation to licensed taverns and shops, providing that no licensed person should allow any bowling alley, billiard or bagatelle table, to be used in any such tavern or shop during the time that the sale of liquor was prohibited therein. The regulation was held to be valid, and the conviction of the appellant was upheld. See also the reasoning of Dubuc, C.J., in *Re Fisher and Village of Carman* (1905), 16 Man. L.R. 560, at p. 562, in dismissing an application to quash a by-law closing pool and billiard rooms from 10 to 6 during the week and all day Sunday, passed under the section of the Municipal Act as to regulating and governing such rooms, a decision which was affirmed on appeal.

It appears to me to be unnecessary to refer to the numerous American authorities to the same effect as the foregoing.

On the whole, I am of opinion that such a regulation as that now in question is, under the authorities, well within the powers of the municipal council of Chatham under sec. 583 (34) of the Municipal Act above quoted.

Counsel for the appellant also urged that the by-law in question should be quashed on the ground that it is unreasonable and oppressive. This point is in reality partly involved in the other, and it was in part argued under that head. The Legislature probably refrained from making any uniform regulations for the Province on this head, because it is essentially one that can be best determined by the authorities in each locality. What may be the best for one municipality may, under altered circumstances and conditions, become a source of disorder and a nuisance in another. The matter seems to be one pre-eminently proper to be dealt with by the local authorities, who have the best means of ascertaining the wants of the local and the travelling public. On the material in this matter, I do not think any such case is made out as would justify the interference of a Court. If, in the result, the public should prove to be inconvenienced by the by-law, which does not appear at all probable,

C. A.  
1910  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.  
Maclaren, J.A.

C. A.  
1910  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.  
Maclaren, J.A.

the council would, no doubt, amend the by-law in accordance with the public desire, but, if they should refuse to do so, the electors have the remedy in their own hands, and could choose others who would.

Under this head we were urged to set aside the by-law on the ground that, among the motives influencing those who promoted the by-law, was that of aiding in the enforcement of Sunday legislation. In reality it is a question of power rather than of motive. The later authorities shew that the Courts should be slow in setting aside the by-laws of public representative bodies, clothed with ample authority, on the ground of supposed unreasonableness. As said by Lord Russell, C.J., in *Kruse v. Johnson*, [1898] 2 K.B. 91, at p. 99, "such by-laws "ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered." And again, on p. 100: "A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than Judges." See to the same effect *Kelly v. City of Winnipeg* (1898), 12 Man. L.R. 87; *Re Fisher and Village of Carman*, *supra*; *Waldron v. Town of Westmount* (1895), Q.R. 8 S.C. 324; *Corporation of Ste. Louise v. Chowinard* (1896), Q.R. 5 Q.B. 362; *Haggerty v. City of Victoria*, (1895), 4 B.C.R. 163.

In my opinion, the appeal should be dismissed.

MAGEE, J.A.:—The by-law in question recites that the city council deem it desirable to pass a by-law to regulate victualling houses and the other houses and places mentioned therein. It proceeds to direct three things: first, that they shall be closed and kept closed for all business purposes during certain specified hours on Sunday afternoon and night; second, that no eatables or refreshments shall be supplied therein during those hours; and third,

that they shall be open to inspection and access by any police officer at all reasonable hours and times.

It is sought to have it quashed as being unreasonable and prohibitory, and therefore beyond the powers of the council.

The Municipal Act, 1903, in sec. 583, clauses 34 and 35, authorises by-laws "for limiting the number of and regulating" such houses and places and "for licensing the same and for revoking any license so granted whenever the council or board deems such revocation desirable without stating any reason therefor." The Legislature manifestly considered such establishments the proper subjects of watchfulness and regulation on the part of the community, and this is the more evident from the recent addition (by 62 Vict. (2) ch. 26, sec. 37 (2)) of this last power of revocation. Being thus recognised as needing control, we must expect restrictions and limitations upon them in its exercise. Regulation, however, it has often been held, does not mean the extinction of that which is to be regulated. It implies its continued existence: *City of Toronto v. Virgo*, [1896] A.C. 88. But it does include power to restrain, as long as the restraint is reasonable, and is not foreign to the purpose for which the power is given. In deciding as to what regulations or restrictions are required in any particular city or district, the local authority, to which the Legislature has intrusted the power, ought naturally to be the best judge, and its discretion, honestly exercised, should not lightly be interfered with. We have not to deal with a corporate body exercising powers for its own benefit, but with a representative body acting for the general good, having no personal end in view. As said in *Slattery v. Naylor*, 13 App. Cas. 446, 452: "In determining whether or no a by-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned." And again: "It is possible that if we were now discussing how the by-law should be framed, it might seem more wise and prudent to make it less absolute. . . . But supposing that to be so, it is quite a different question whether a by-law like the present one is to be held unreasonable because such considerations have been overlooked or rejected by its framers:" pp. 451, 452.

By this by-law the hours during which the various places dealt with are directed to be closed are those between 2 and 5 p.m. on Sundays and from 7.30 p.m. on Sunday till 5 a.m. on Monday. The

C. A.  
1910  
—  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.  
—  
Magee, J.A.

C. A.  
1910  
—  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.  
—  
Magee, J.A.

appellant in his own affidavit states that the dining-rooms of all the hotels in Chatham do not keep open after 2 p.m. and 7 p.m. on Sundays. It may be assumed, therefore, that the restrictions imposed by the council upon the victualling houses with regard to furnishing meals are not more onerous than those adopted by the hotel-keepers for themselves. The habits of people in Chatham as to their hours for eating are not presumably different from those of people elsewhere. So far from shewing any desire on the part of the council to make prohibitory restrictions, the selection of the hours would seem to indicate a desire that they should do business at the time best adapted to give them the benefit of the most lucrative legitimate trade. Indeed, it appears that all the restaurant-keepers in the city but the applicant himself signed a petition in favour of even more restricted hours on Sunday. It is true that he says, except in his own and one other establishment, the furnishing of meals is not the preponderating part of the business, and the keeper of the other makes an affidavit alleging that he signed under a misstatement made to him; but that allegation is, I think, fully met and disproved by the unanswered affidavit filed on the other side. The applicant puts in affidavits of three hotel-keepers out of fourteen in Chatham, that on several occasions since the by-law (passed four months previously) persons have come off night trains to their respective hotels, and, owing to the closing of the restaurants under the by-law, have, to their great inconvenience, been unable to procure anything to eat until the following Monday morning. Whether it is fair to credit the famished condition of their guests to the by-law, these hospitable people must settle for themselves. The evidence—chiefly as to inconvenience to travellers coming in by the only two evening trains, arriving at 9 and 9.42 p.m. respectively—does not impress one as to the likelihood of injury to the public. The members of the city council should be the best judges as to the needs of the place.

It appears that complaint had been made to the council about the attendance at these restaurants, which, if others are like the applicant's, have a shop and confectionery in the same premises, and over which, one can well conceive, if there were no other objection, it would be difficult to exercise police supervision for the enforcement of the law respecting the Lord's day. It is the day upon which people are released from their ordinary avocations, and there-



fore can congregate in greater numbers at such places without reasonable necessity, and one can well understand that the loss of business from that source might be considerable to the applicant, probably much more than from the travellers who have not already had supper before reaching Chatham.

The by-law says the council have deemed it desirable to pass it. Evidently all parties interested had notice of the intention to introduce it, and would have an opportunity to urge any objections before the council. It does not appear to me that in Chatham its passage was not desirable and reasonable.

Then, assuming the hours to be reasonable or not so unreasonable that the Court can quash the by-law on that account, does the mere fact that there is a prohibition as to some hours make the by-law invalid?

The decision in *City of Toronto v. Virgo*, [1896] A.C. 88, was urged as holding that even a partial prohibition is unlawful. There the restriction was as to "the busiest and most important thoroughfares of the city," and as to all times, and their Lordships could not accede to the argument that it did not amount to prohibition. But there the Privy Council recognise that "regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place."

In *Baker v. Municipal Council of Paris*, 10 U.C.R. 621, referred to in *In re Barclay and Township of Darlington*, 12 U.C.R. 86, the Court considered that the council might legally ordain that the bar-room must be closed during certain hours, including Sunday. And in *In re Greystock and Municipality of Otonabee*, 12 U.C.R. 458, the Court considered such a by-law "a reasonable and good enactment." The partial prohibition, it has thus long been recognised, may well come within the powers of regulation. The reasonableness of it, as adapted to the particular locality, is a question of fact. I do not think it has been established here that this by-law is unreasonable, and, if it was not, then I think it was clearly within the powers of regulation. The appeal, I think, should be dismissed with costs.

MOSS, C.J.O., and GARROW, J.A., concurred.

MEREDITH, J.A.:—The by-law in question ought, in my opinion, to have been quashed, for the reason—which I must say seems to

C. A.  
1910  
—  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.  
—  
Magee, J. A.

C. A.  
1910  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.  
Meredith, J.A.

me a very plain one—that it was not passed for the purpose of regulating victualling houses, a subject within the power of the municipal council, but was passed for the purpose of compelling the better observance of the Lord's day, a subject quite beyond the power of such council.

The real purpose is manifest: the agitation of the subject was begun, and apparently carried through by “a minister of the gospel,” not with any purpose or thought of improving such houses, or benefiting those who carried them on, or their customers, but solely and expressly with the thought and purpose of preventing, as much as possible, persons from going to such houses for refreshment on Sunday; the main complaint being that persons resorted to the two houses of the kind, kept open on that day, for the purpose of being served with ice cream and such like, generally considered, unsubstantial victuals.

If there were any breach of the criminal law, in this respect, the proper course was a prosecution of the offenders, not the closing of the houses and businesses without lawful authority.

The ingenuous character of the appeal to the council—if it really were ingenuous—is worth stating. It was based upon a “petition” of all the keepers of licensed victualling houses in the city, with the one exception of the appellant: apparently a very strong case, but one out of which the strength rapidly oozes when the fact is mentioned that the others were all competitors of the appellant, and that only one of them kept his house open on Sunday; and he now repudiates his signature, asserting that it was obtained by misrepresentation.

I am unaware of any law which requires inn-keepers to furnish “meals at all hours;” reasonable accommodation is all that they are bound to give; nor can I see the force of the argument that it is right that the keeper and servants of this one victualling house—which alone serves all the needs of the town—or at most two, should have a day of rest, if that means that none of the keepers, or their servants, of the many inns shall, in consequence, have such a rest. It would be an extraordinary state of affairs if every inn-keeper throughout the land, in peril and pain of the law, should be obliged to be in attendance, with all necessary servants, to supply, at any moment, meals for any traveller who might demand one on Sunday, or indeed any day, however unreasonable the hour.

It is also to be observed that the municipality, after granting to the appellant an unrestricted—in this respect—license to carry on the business of a victualling house keeper, interpose, during the currency of the license, with a prohibition against carrying on that business for thirteen profitable hours in every week; the sole object being not the good government of the trade and business, but a stricter observance of Sunday. That, in my opinion, cannot, in any way, be considered an exercise of the statute-conferred power to regulate victualling houses; as a matter of fact, I find it to have been prohibition for an ulterior purpose, a purpose *ultra vires* of the municipal corporation.

I would allow the appeal, and quash the by-law.

C. A.  
1910  
RE  
KARRY  
AND  
CITY OF  
CHATHAM.  
Meredith, J.A.

---

[TEETZEL, J.]

GOLDSTINE V. CANADIAN PACIFIC R.W. CO.

ROBINSON V. CANADIAN PACIFIC R.W. CO.

1910  
July 14.

*Railway—Carriage of Live Stock—Special Contract—Approval by Board of Railway Commissioners—Injury to Persons in Charge Travelling Free, by Reason of Negligence—Neglect of Servants of Railway Company to Obtain Assent to Terms of Contract—Liability—Indemnity by Owners and Shippers—Duty to Inform Persons in Charge—Implied Agreement to Indemnify.*

The third parties shipped two car-loads of horses over the defendants' line, and placed G. and R. in charge. G. was killed and R. injured while on the defendants' train, through the negligence of the defendants, and in actions brought by the administrator of the estate of G. and by R. against the defendants judgments were recovered against the defendants for damages for the negligence. The defendants sought indemnity against the third parties, the owners and shippers of the horses. Special contracts for shipment of live stock were signed by the defendants' agent and by the third parties, the form of contract being that authorised by the Board of Railway Commissioners under the Railway Act of Canada. The rate of freight charged was that authorised under Canadian classification No. 14, dated the 15th December, 1908, and approved by the Board, in cases where the stock is shipped under the terms and conditions of the special contract, which classification contains certain general rules governing the transportation of live stock, including this, that the owner or his agent must accompany each car-load, and owners or agents in charge of car-loads will be carried free on the same train with their live stock, upon their signing the special contract approved by the Board. G. and R. were carried free, but neither signed the special contract, nor was any pass issued and delivered to either of them embodying its terms, and neither of them knew the contents of the special contract. Upon the face of each contract was written, "Pass man in charge." Among the conditions of the contract were, that the liability of the defendants should be restricted to \$100 for the loss of any one horse, and that in case of the defendants granting to the shipper or any nominee

1910  
 ———  
 GOLDSTINE  
 v.  
 CANADIAN  
 PACIFIC  
 R.W. Co.  
 ROBINSON  
 v.  
 CANADIAN  
 PACIFIC  
 R.W. Co.

or nominees of the shipper a pass or privilege less than full fare to ride on the train in which the property is being carried, for the purpose of caring for the same while in transit, and at the owner's risk, then, as to every person so travelling, the defendants are to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the defendants or their servants or employees, or otherwise howsoever. On the back of the contract, and as part of the document approved by the Board, provision was made for each person entitled to free passage to sign his name, followed by a note that agents must require such persons to write their own names on the lines above. The defendants' agent neglected to observe this direction:—

- Held*, that the third parties owed no duty to the defendants to inform G. and R. of the terms of the special contract.
2. Looking at the express terms of the written contract, including the rule set forth in classification 14, intended for the guidance of both parties, and having regard to all the circumstances under which the contract was entered into, there was no implied agreement on the part of the third parties to indemnify the defendants, in order to give the transaction such efficacy as both parties must have intended it to have. There would have been no claim against which to be indemnified if the defendants' agent had performed his duty, and it would be contrary to principle to imply an agreement by the third parties to protect the defendants from the consequences of their own carelessness.

ISSUE between the defendants and Burns and Sheppard, third parties.

The facts are stated in the judgment.

May 2. The issue was tried by TEETZEL, J., without a jury, at Toronto.

*Wallace Nesbitt*, K.C., and *G. A. Walker*, for the defendants, the Canadian Pacific Railway Company.

*W. R. Smyth*, K.C., for Burns and Sheppard, the third parties.

July 14. TEETZEL, J.:—The plaintiff in the first action is the administrator of the estate of Meyer Goldstine, who was killed, and the plaintiff Robinson was injured, on a train of the defendants, through negligence of the defendants' servants.

At a former sittings of the Court judgment by consent was entered in favour of the plaintiffs for \$1,750 and \$750 respectively, without costs; and the question for determination in each case is whether the third parties are bound to indemnify the defendants against payment of those sums.

At the time of the accident the deceased Goldstine and the plaintiff Robinson were each in charge of a car-load of horses shipped from Toronto to points in the Western Provinces, under special contracts for shipment of live stock (exhibit 3), which contracts are signed by the defendants' agent and by the third parties as shippers.



The deceased Goldstine was a member of the firm of Fawcett & Goldstine, who were the consignees named in the contracts, and Robinson was an employee of that firm.

The third parties endeavoured to establish at the trial that they were not the owners of the horses, within the meaning of the general rules governing the transportation of live stock, set forth in Canadian classification No. 14 (exhibit 4), and that, while they signed the contract as shippers, they were, to the knowledge of the defendants, only acting as agents for the consignees.

I am of opinion, upon the evidence, that, for the purpose of determining the rights of the parties in this action, the third parties must be deemed to be both owners and shippers.

The rate of freight is specified in the contracts, which also contain, *inter alia*, the following provisions:—

“The company being willing to undertake the transportation of the said property as aforesaid, either at the said rate, on the condition that its liability shall be restricted as hereinafter mentioned, or at a higher rate, without its liability being restricted, the shipper hereby elects to have it carried under this contract at the said lower rate and on the said condition, and he declares that of the property . . . no horse . . . exceeds one hundred dollars in value. . . .”

“The company . . . shall in no case be responsible for any amount exceeding \$100 for the loss of any one horse. . . . Said stock is to be loaded, unloaded, and watered, and while in the cars cared for in all respects by the shipper or owner and at his expense and risk . . . When destination of any shipment of live stock is more than one hundred miles from the point of shipment, the shipper or owner or some person on his behalf (not an employee of the company) must accompany and care for the shipment throughout the journey, and, unless the shipment is so accompanied, the company shall be relieved from all obligation to carry the same.”

“If the company carry such live stock without it being so accompanied, it shall not be liable for any loss or damage due to the live stock not being so accompanied and cared for.”

“In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare to ride on the train in which the property is being carried, for the purpose of caring for the same while in transit, and at the owner's

Teetzel, J.

1910

GOLDSTINE  
v.CANADIAN  
PACIFIC  
R.W. Co.ROBINSON  
v.CANADIAN  
PACIFIC  
R.W. Co.

Teetzel, J.  
1910  
GOLDSTINE  
v.  
CANADIAN  
PACIFIC  
R.W. Co.  
ROBINSON  
v.  
CANADIAN  
PACIFIC  
R.W. Co.

risk as aforesaid, then, as to every person so travelling on such a pass or privilege less than full fare, the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company or its servants or employees, or otherwise howsoever."

The contracts were in the exact form of contract approved and authorised by the Board of Railway Commissioners under the provisions of the Railway Act on the 17th October, 1904.

There was no dispute that the rate of freight charged was that authorised under Canadian classification No. 14, dated the 15th December, 1908, and approved of by the Board of Railway Commissioners, in cases where the stock is shipped under the terms and conditions of the above special contract, which classification contains, at p. 46, the following, among other, general rules governing the transportation of live stock: "The owner or his agent must accompany each car-load or less than car-load of live stock, as the case may be, when the distance is over one hundred miles, unless special authority is first obtained from the general or division freight agent. . . . Owners or their agents in charge of car-loads will be carried free on the same train with their live stock, upon their signing the special contract approved by the Board of Railway Commissioners."

Neither Goldstine nor Robinson signed the special contract, nor was any pass issued and delivered to them embodying its terms, nor, as I understood upon the argument, were the defendants in a position to shew that either of the men knew the contents of the special contract; hence there was nothing to defeat their common law right to damages occasioned by negligence of the defendants' servants.

Though the evidence does not shew that the third parties expressly nominated Goldstine and Robinson to take charge of the horses while in transit, I think they must be treated as their nominees under the special contract, and as their agents within the meaning of the above general rules. They were certainly in charge when the horses were loaded upon the cars, and on the face of each special contract was written, with the concurrence of the representative of the third parties, when the special contract was delivered to the defendants, the words: "Pass man in charge." No money was paid for the fare of either Goldstine or Robinson, the

only consideration for carrying them free apparently being the restricted liability of the defendants as to the stock and their freedom from liability to the persons carried conferred by the special contracts.

Quite independently of the special contract having been approved by the Board of Railway Commissioners, it was, according to the decisions in *Hall v. North Eastern R.W. Co.* (1875), L.R. 10 Q.B. 437, and *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431, quite competent for the shippers or their nominees to agree with the defendants to travel at their own risk of personal injury in consideration of being allowed to travel free.

In this case, if the defendants had either adopted the course taken in *Hall v. North Eastern R.W. Co.* (*supra*), where the plaintiff was a man in charge, and issued to Goldstine and Robinson a ticket or pass embodying the agreement, or had got them to sign the special contract, as is provided for in the general rule above quoted, they would, upon the above authorities, have been able to escape liability in these actions. In this connection it is to be observed that on the back of the special contract, and as part of the document approved by the Board, provision is made for each person entitled to free passage thereunder to sign his name, followed by a note in these words: "Agents must require those entitled to free passage in charge of live stock under this contract to write their own names on the lines above." In these cases the defendants' agent neglected to observe this direction.

The defendants rest their claim against the third parties on two grounds:—

(1) That, under the provisions of the special contract, it was the duty of the third parties to inform Goldstine and Robinson of the terms and conditions of the special contract before allowing or requiring them to travel upon the defendants' train as their nominees in charge of the horses.

(2) That under the contract there was an implied agreement by the third parties to indemnify the defendants against liability for injury to the persons carried free.

It was not pretended that the third parties in any way communicated to either Goldstine or Robinson the terms of the special contract.

I have been unable to find any authority which would support

Teetzel, J.

1910

GOLDSTINE  
v.CANADIAN  
PACIFIC  
R.W. Co.ROBINSON  
v.CANADIAN  
PACIFIC  
R.W. Co.

Teetzel, J.  
1910  
GOLDSTINE  
v.  
CANADIAN  
PACIFIC  
R.W. Co.  
ROBINSON  
v.  
CANADIAN  
PACIFIC  
R.W. Co.

the contention that the third parties owed any duty to the defendants to inform Goldstine and Robinson of the terms of the special contract, and I do not think that on any principle can such a duty be rested. There is nothing in the contract itself to suggest that the defendants would rely on the men being so informed by the shippers, but, on the contrary, the contract itself and the general rule in classification 14 clearly shew that the defendants were not to rely on any such suggested duty, because, as already pointed out, both on the back of the contract and in the rule express provision is made for the person in charge to sign the special contract. It was, therefore, the clear duty of the defendants' agent, in order to deprive the person in charge of his common law rights against the defendants, in case of injury by negligence of their servants, to make him aware of the condition upon which he was being carried free, and to obtain his express assent thereto. It must be assumed that the third parties knew of these provisions of the contract and rule, and they had a right to suppose that, before the person in charge was permitted to travel upon the defendants' train, their agent would perform his duty in regard thereto. For the third parties to undertake what was the defined duty of the defendants' agent would, as between the third parties and the defendants, be an act of supererogation.

I think the most that can be said is that, by omitting to inform the person in charge of the terms of the contract, the third parties took the risk of the person in charge refusing to accept or sign the contract when presented to him by the defendants, in which case, if no one else was placed in charge, two results might follow under the contract, *viz.*: (a) the defendants would be "relieved from all liability to carry" the stock; or (b) "if the company carry such live stock without it being so accompanied, it shall not be liable for any loss or damage due to the live stock not being so accompanied and cared for."

Then as to liability under an implied agreement to indemnify. Counsel for the defendants cited *The Moorcock* (1889), 14 P.D. 64, and *Ogdens Limited v. Nelson*, [1903] 2 K.B. 287, [1904] 2 K.B. 410, and [1905] A.C. 109. In his judgment in the first case, at p. 68, Bowen, L.J., says: "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed



intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe, if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

In *Ogdens Limited v. Nelson*, by a contract between the plaintiffs and defendants it was agreed that, in consideration of the defendant undertaking to become a customer of the plaintiffs and to purchase goods direct from them and not to sign any agreement with any other firm in the same trade which would prevent him from dealing with the plaintiffs, the plaintiffs would thenceforward for a period of four years distribute an annual bonus among their customers, including the defendant, and in proportion to the purchases made by them respectively, a certain fixed annual sum, and also the expected profits on certain goods sold by the plaintiffs during that period. In an action for the price of goods sold to him, the defendant counterclaimed for damages for breach of the contract, and it was held that it was an implied term of the contract that the plaintiffs would continue to carry on business during the full period of four years, and that they would not, during that period, do any act disabling themselves from earning profits or preventing the defendant from being a customer of the plaintiffs, and that the defendant was entitled to damages. Lord Alverstone, C.J., in his judgment, [1903] 2 K.B. at p. 297, citing *The Moorcock*, and referring to the principles laid down by Bowen, L.J., says: "But the real difficulty is not the enunciation of these principles, but their application. In each case the terms of the contract and its object must be considered in order to ascertain whether the conduct complained of does destroy the object of the contract or prevent the performance of its manifest intention."

In *Hamlyn & Co. v. Wood & Co.*, [1891] 2 K.B. 488, *The Moorcock* was discussed, and the rule adopted that the Court ought not to imply a term in a contract, unless there arises from the language of the

Teetzel, J.

1910

GOLDSTINE

v.

CANADIAN

PACIFIC

R.W. Co.

ROBINSON

v.

CANADIAN

PACIFIC

R.W. Co.

Teetzel, J.  
 1910  
 GOLDSTINE  
 v.  
 CANADIAN  
 PACIFIC  
 R.W. Co.  
 ROBINSON  
 v.  
 CANADIAN  
 PACIFIC  
 R.W. Co.

contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied. Kay, L.J., at p. 494, says: "When parties have put into writing the terms upon which they agree, more especially in the case of mercantile contracts, it is a dangerous thing lightly to imply what they have not expressed."

Now, looking at the express terms of the written contract, including the rule set forth in classification 14, intended for the guidance of both parties, and having regard to all the circumstances under which the contract was entered into, I find it impossible to conclude that there must be implied an agreement on the part of the third parties to indemnify the defendants as claimed, in order to give the transaction such efficacy as both parties must have intended it to have. There would have been no claim to be indemnified against if the defendants' agent had performed his duty to his employers, and it surely would be contrary to principle to imply an agreement by the third parties to protect the defendants from the consequences of their own carelessness.

Judgment must be entered in each action dismissing the defendants' claim against the third parties, with costs.

---

[MEREDITH, C.J.C.P.]

1910  
 July 26.

# RE RYAN AND TOWN OF ALLISTON.

*Municipal Corporations—Local Option By-law—Voting on—Voters' List Certified by County Court Judge—Ontario Voters' Lists Act—Complaint—Notice of Holding Court—Duty of Clerk.*

The certified list of voters used at the voting upon a local option by-law, being the list in fact certified by the Judge of the County Court, was *held*, the proper list, within the meaning of the Voters' Lists Act, notwithstanding that the Judge might have omitted to comply with the requirements of subsec. 4 of sec. 17, as to the publication of notice of the sittings of the Court for the revision of the list, and that the only person who made a complaint was a person not entitled under the Act to be a complainant.

The last *de facto* certified voters' list filed in the office of the Clerk of the Peace is all that the clerk of the municipality is to concern himself with; and where an election has been held at which such a list has been used, it is not open to attack because of some informality or omission on the part of the Judge or of any of the officers intrusted with duties in connection with the list in the performance of their duties under the Act in accordance with its provisions.

THIS was a motion to quash by-law No. 227 of the council of the Town of Alliston—a local option by-law.

April 18. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court at Toronto.

*J. B. Mackenzie*, for the applicant.

*W. A. J. Bell*, K.C., for the respondents.

July 26. MEREDITH, C.J.:—Upon the argument I disposed of all the objections taken by the applicant, except one, adversely to his contention.

The one reserved is numbered one in the notice of motion, and is as follows: "That there was no lawful or sufficient revised voters' list upon which to carry on the voting on such by-law."

This objection was rested on two grounds:—

(1) That there was no valid complaint against the list prepared by the clerk of the municipality, because, as was contended, the only person who complained was not a voter.

(2) That notice of the holding of the Court for the revision of the list was not published as required by sub-sec. 4 of sec. 17 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4.

The voters' list was in fact certified by the Judge of the County Court, and one copy of it was sent to the Clerk of the Peace, and was filed by him on the 17th September, 1909, and another to the clerk of the municipality, and the third was retained by the Judge, all in accordance with the provisions of sec. 21.

By sec. 24 the certified list is made final and conclusive evidence, upon a scrutiny under the Municipal Act, that "all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used," save in certain excepted cases which do not affect the question under consideration.

Section 148 of the Consolidated Municipal Act, 1903, provides that "the proper list of voters to be used at an election" shall be "the first and second parts of the last list of voters certified by the Judge and delivered or transmitted to the Clerk of the Peace under the Voters' Lists Act."

The certified list used at the election at which the by-law was voted on was, in my opinion, the proper list to have been used within the meaning of the Act, notwithstanding that the Judge may have omitted to comply with the requirements of sub-sec. 4 of sec. 17 of the Voters' Lists Act, as to the publication of notice

1910  
—  
RE  
RYAN  
AND  
TOWN OF  
ALLISTON.

Meredith, C.J.

1910

RE

RYAN

AND

TOWN OF

ALLISTON.

of the sittings of the Court for the revision of the list, and that the only person who had made a complaint was a person not entitled under the Act to be a complainant.

I do not find either in the Municipal Act or the Voters' Lists Act any provision similar to that contained in sec. 66 of the Assessment Act, 4 Edw. VII. ch. 23, making the assessment roll, as finally passed by the Court, valid and binding notwithstanding defects or errors; but in the nature of the thing it must have been intended that a *de facto* list, certified by the Judge, and especially where an election had been held at which it was used, should be for the purpose of that election the proper list to be used, and not intended that it should be open to some one whose industry had led to the discovery that a complainant who was treated as one having a right to complain had not that right, or that there was some omission as to the publication of the notice required by sub-sec. 4 of sec. 17 of the Ontario Voters' Lists Act, to attack the election on that ground.

To give effect to the objections of the applicant would mean that a ministerial officer, the clerk, would be called upon, when an election is to be held, to enter upon an inquiry as to whether there had been a compliance with the law in those respects, in order to determine what was the proper list to be used at the election.

The duties of the clerk as to the voters' lists are prescribed by secs. 152, 153, and 157 of the Municipal Act; by sec. 153 it is provided that the copies of the voters' lists which he is to deliver to the deputy returning officers under sec. 152 may be prepared by him or may be procured from the Clerk of the Peace; and by sec. 157 he is required, in the case of a municipality not divided into wards or polling subdivisions, to provide himself with copies of the voters' lists similar to those required to be furnished to deputy returning officers.

All this points to the conclusion that the last *de facto* certified voters' list filed in the office of the Clerk of the Peace is all that the clerk of the municipality is to concern himself with, and leads necessarily, I think, to the conclusion that, where an election has been held at which such a list has been used, it was not intended that the election should be open to attack because of some informality or omission on the part of the Judge or of any of the officers intrusted with duties in connection with the list in the performance of their duties under the Act in accordance with its provisions.

The motion is dismissed with costs.



## [DIVISIONAL COURT.]

## FORD V. CANADIAN EXPRESS CO.

1909

Oct. 30.

D. C.

1910

*Malicious Prosecution—Reasonable and Probable Cause—Honest Belief—Reasonable Care to Ascertain Facts—Evidence—Questions for Judge—Improper Submission to Jury—Facts not Truly Stated to Crown Officer—Damages for Remand.*

The effect of the decision of the Supreme Court of Canada in *Archibald v. McLaren* (1892), 21 S.C.R. 588, upon the question of reasonable and probable cause in an action for malicious prosecution, is to overrule the decision of the majority of the Court of Appeal in *Hamilton v. Cousineau* (1892), 19 A.R. 203, and to settle the law, as far as the Courts of this Province are concerned, in accordance with the views expressed by Armour, C.J., and Street, J., in the Divisional Court, and the dissenting judgment of Burton, J.A., in the Court of Appeal, in *Hamilton v. Cousineau*. The question in that case was as to whether the defendant had exercised reasonable care to inform himself of the facts before he laid the information, and the question which it was unsuccessfully argued in *Archibald v. McLaren* should have been submitted to the jury was as to the honest belief by the defendant of the truth of the information upon which he acted in instituting criminal proceedings; but the same rule as to when it is proper to submit these questions must apply to both of them.

July 27.

*Still v. Hastings* (1907), 13 O.L.R. 322, 324, followed.

*Abrath v. North Eastern R.W. Co.* (1883-6), 11 Q.B.D. 79, 440, 11 App. Cas. 247, explained as in accord with *Archibald v. McLaren*.

Where a charge of forgery was first made against the plaintiff and withdrawn, and a charge of theft then made, upon which the plaintiff was tried and acquitted:—

*Held*, in an action for malicious prosecution, upon the undisputed facts and treating every controverted matter as if it had been found against the defendants, that there was nothing in the evidence which warranted the submission to the jury of a question as to whether M., the local agent of the defendants, who laid the informations against the plaintiff, honestly believed the plaintiff guilty of forgery and theft, or the submission of a question as to the exercise of reasonable care to ascertain the true facts. The facts and circumstances known to M. pointed to the plaintiff's guilt, and, so far as appeared, M. did not know the plaintiff even by sight, and no motive for making a false charge was suggested.

Assuming it to be true that M., in placing the facts before the Crown Attorney, previous to swearing to the information, told him that a handwriting expert was of opinion that the forged writing was the plaintiff's, whereas the expert had merely indicated some points of resemblance between the writing in the forged documents and a genuine specimen of the plaintiff's handwriting, but had declined to give an opinion—that had no bearing on the issue as to reasonable and probable cause.

*Held*, also, in the circumstances, that the plaintiff was not entitled to damages for his remand on the charge of forgery; although the prosecution was not discontinued when the expert gave an opinion, as he afterwards did, that the forged documents were not in the handwriting of the plaintiff, there was nothing to shew when that opinion was given, further than that it was before the 2nd October, when the charge of forgery was withdrawn.

*Fancourt v. Heaven* (1909), 18 O.L.R. 492, distinguished.

*Held*, therefore, that it should have been ruled at the trial that the plaintiff had failed to establish want of reasonable and probable cause; and the action was dismissed.

Judgment of MULOCK, C.J.Ex.D., reversed.

ACTION for damages for malicious prosecution and false arrest.

Mulock, C.J.  
1909  
FORD  
v.  
CANADIAN  
EXPRESS CO.

October 6 and 7, 1909. The action was tried before MULOCK, C.J.Ex.D., and a jury, at Toronto.

*H. H. Dewart, K.C., and J. S. Lundy, for the plaintiff.*

*C. Millar, for the defendants.*

October 30. MULOCK, C.J.:—The defendants are an express company carrying on business in Toronto and elsewhere, their head office being in Montreal. Their chief officers for Ontario are: Mr. Allen, superintendent for the whole province; Mr. Wilson, general agent for the province; and Mitchell, local agent in Toronto. These three officers interested themselves in the proceedings which were instituted against Ford; Mitchell, at the instance of Allan and Wilson, swearing to the informations leading to the plaintiff's arrest. What he thus did was with the approval and concurrence and on the instructions of his superior officers, and, in view of the jury's answers, bound the defendants.

It appears that the express company are in the habit of intrusting to responsible persons books containing express orders for money, which these persons are at liberty to fill up and issue, accounting for the value to the company. On a certain day a man presented himself in their Toronto office with a written order, purporting to be signed by White & Co., a business firm in Toronto, requesting the company to deliver to the bearer, for the firm, a book of express orders, which was accordingly done, the man giving to the defendants a receipt in the name of White & Co. for the book. Shortly thereafter it was discovered that the order was a forgery, and that White & Co. had nothing whatever to do with the transaction. The plaintiff, Ford, had at one time been a clerk in the establishment of White & Co., and, on their examination of the forged order and receipt, two of the employees, after suspecting two other persons, cast suspicions on the plaintiff, by expressing the view that there was a similarity between the writing of the plaintiff, Ford, and the forged papers. Genuine samples of the handwriting of the plaintiff, together with the forgeries, were then shewn to Mr. Stanton, a handwriting expert, who expressed the view that two or three letters in the forged writings resembled the same letters in the genuine handwriting of the plaintiff, but declined to give an opinion unless he were permitted to take the papers home and study them. This opportunity was not afforded him. Mitchell

and others then waited upon Mr. Corley, Crown Attorney, and laid the case before that officer. The evidence shews that Corley was informed by Mitchell, or in the presence of Mitchell, and with his knowledge, that, in Stanton's opinion, the plaintiff had written the forged documents. Some other statements, calculated to throw suspicion on the plaintiff, were also made to Mr. Corley, and he directed Mitchell to apply to Officer Duncan, who would prepare the necessary information to be sworn to. Mitchell then waited upon Mr. Duncan, and the next morning swore to an information charging the plaintiff with having forged one of the express orders issued from the book in question. Thereupon the prisoner was arrested on the 29th August, 1908, and kept in custody, bail being refused, until the 4th September. A day or so after the plaintiff's arrest, an item appeared in a Toronto newspaper to the effect that Stanton had given it as his opinion that the plaintiff had committed the forgery. Thereupon Stanton called upon Mitchell and pointed out to him the incorrectness of this report, reminding him that he had refused to give an opinion unless he were afforded an opportunity of taking the papers home to study them. Mitchell did not then, or at any time, so far as appears, communicate to Corley Stanton's repudiation of the correctness of the newspaper item.

On the 4th September the plaintiff was admitted to bail. Subsequently Stanton was asked to make a report, which he did, giving it as his opinion that the plaintiff was not the forger. Thereupon the Crown withdrew the charge of forgery, Mr. Corley making in the witness-box a statement to the effect that, if he had not been assured that Stanton was of opinion that Ford had committed the forgery, he would not have advised the issuing of a warrant.

On the same day that the proceedings in respect of the forgery were abandoned, Mitchell swore to another information, charging the plaintiff with theft of the book of orders. Thereupon a warrant was issued, the prisoner was arrested, admitted to bail, tried on the charge of theft at the Court of Quarter Sessions, and found not guilty; and this action is brought for damages because of these prosecutions. The termination of the prosecutions in the plaintiff's favour was admitted; and therefore it was not necessary to submit to the jury a question on that point.

In submitting the case to the jury I divided the plaintiff's various causes of action into three, namely: one in respect of the

Mulock, C.J.

1909

FORD

v.

CANADIAN  
EXPRESS CO.

Mulock, C.J.  
1909  
FORD  
v.  
CANADIAN  
EXPRESS CO.

arrest and proceedings for forgery down to the first remand; another in respect of the proceedings from the first remand until the termination of the proceedings for forgery; another in respect of the arrest for theft; and I prepared questions applicable to each of these causes of action. Unfortunately, by some mistake, one sheet of paper, containing five questions prepared for the jury, being numbers 6, 7, 8, 9, and 9a, became detached from the others, and only after the jury had been discharged, after having answered certain questions, was it discovered that the paper containing these five questions was not taken by the jury to the jury-room, with the result that there is no finding in regard to them. They related entirely to the charge of forgery. Those questions not having been dealt with by the jury, the findings do not warrant a judgment for either party in respect of the prosecution for forgery. The causes of action, however, being entirely separate, the correct course to adopt is, I think, to treat the issue in regard to the forgery charges as untried, the plaintiff being at liberty, if he so desires, to go to trial on these two issues.

As to the cause of action for theft, the jury found malice against the defendants, that Mitchell, their agent, at the time he laid the information for stealing, did not honestly believe the plaintiff guilty of that offence, and they awarded the plaintiff \$750 damages for the arrest for theft.

The defendants at the trial, notwithstanding the verdict of "not guilty," renewed the charges of forgery and stealing against the plaintiff, and I allowed them to give evidence in support of the charges, and this they endeavoured to do, and I submitted to the jury the question (No. 14), "Was the plaintiff guilty of the stealing charged?" A. "Ten answer no, two are doubtful." I also submitted question No. 12, "Did Mitchell at the time he laid the information for stealing honestly believe the plaintiff guilty of stealing?" A. "Ten say no, two say yes."

On this answer that Mitchell, who laid the information leading to the plaintiff's arrest for stealing, did not honestly believe him guilty, I find that there was an absence of reasonable and probable cause, and am of opinion that the plaintiff, if he so desires it, is entitled to judgment at this stage for the sum of \$750, being the damages awarded in respect of the arrest for theft, and to go to trial on the other issues.

The plaintiff is entitled to the costs of the action.



The defendants appealed from the judgment of MULOCK, C.J.

December 20 and 21, 1909. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

D. C.

1910

FORD  
v.

CANADIAN  
EXPRESS CO.

*C. Millar*, for the defendants. The plaintiff has not discharged the onus cast upon him of shewing that the defendants acted maliciously in laying the information or that they authorised or directed the prosecution. The evidence which they had before them would lead any reasonable man to believe that the plaintiff was guilty of the charges laid against him, and such was the opinion of the Crown officer upon whose advice and under whose direction the information was sworn and the subsequent proceedings taken: *Smith v. Evans* (1863), 13 C.P. 60, at p. 62. The learned trial Judge erred in telling the jury that in a case of this sort it was not necessary to prove malicious intention or actual malice on the part of the defendants, and by so doing he in effect left the question of reasonable and probable cause to the jury. The evidence shewed that Mitchell acted in good faith and without malice, and the case should have been withdrawn from the jury: Clerk & Lindsell on Torts, Canadian ed., p. 642; *Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh* (1908), 24 Times L.R. 884; *Watt v. Clark* (1889), 18 O.R. 602. The case should not have been split up and left partially undecided, as it has been by the judgment of the trial Judge. The whole case was tried out, and one judgment should suffice.

*H. H. Dewart*, K.C., and *J. S. Lundy*, for the plaintiff. On the evidence, the defendants were bound by the action of their agents, Allen, Wilson, and Mitchell. [MEREDITH, C.J., said that there was no finding that either Allen or Wilson had power to bind the defendants, and that it was only Mitchell's action that could make them liable.] It is not shewn that Mitchell had grounds on which to base an honest belief as to the plaintiff's guilt, and he failed to submit certain material facts to the Crown Attorney. As to the liability of a corporation for malicious acts done by its agents acting within the scope of their authority, or in the course of their employment, *Lyden v. McGee* (1888), 16 O.R. 105, at p. 108, and *Citizens' Life Assurance Co. v. Brown*, [1904] A.C. 423, may be referred to. On the question raised by the Court as to the plaintiff's right to put in evidence the depositions of the defendants' witnesses

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS CO.  
Meredith, C.J.

before the magistrate, the following cases were referred to: *Walker v. South Eastern R.W. Co.* (1870), L.R. 5 C.P. 640, *per* Montague Smith, J., at p. 644; *Lea v. Charrington* (1889), 5 Times L.R. 218, at p. 219.

*Millar*, in reply.

July 27. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the defendant company from the judgment which on the 30th October, 1909, the Chief Justice of the Exchequer Division directed to be entered on the findings of the jury, after the trial before him at Toronto on the 6th and 7th days of the same month.

The action is for malicious prosecution, and the respondent claims damages in respect of (1) a prosecution for forgery, (2) several remands on that charge, and (3) a subsequent prosecution for theft, all of which, as he alleges, were instituted or caused by the appellants.

At the close of the respondent's case the appellants' counsel objected that absence of reasonable and probable cause was not proved and that the appellants were not liable for the acts of Mitchell, their agent at Toronto, who laid the informations.

The learned Chief Justice, after the testimony of Mitchell had been taken, for which purpose he permitted the respondent to reopen his case, though he did not in terms rule against the objections raised by the appellants' counsel, must have refused the motion for a nonsuit, for the appellants entered upon their defence and adduced evidence in support of it.

After an elaborate charge, in which the evidence was reviewed, the learned Chief Justice left to the jury the following questions:—

1. In laying the information for forgery against the plaintiff, was Mitchell acting within the scope of his authority as agent of the defendant company?
2. In laying such information, was Mitchell acting on behalf of the defendant company?
3. In laying the information for stealing against the plaintiff, was Mitchell acting within the scope of his authority as agent for the defendant company?
4. In laying said information for stealing, was Mitchell acting on behalf of the defendant company?

5. Were all the facts of the case laid fairly before Crown Attorney Corley by Mitchell, Allen, and Wilson, or any of them, or by any other person before the warrant for forgery issued?

5a. In charging the plaintiff with forgery, did the company act in good faith, relying on the judgment of the Crown Attorney and believing the plaintiff guilty?

6. Before the Crown Attorney directed the issue of a warrant for forgery, was he informed, at the interview between Rogers, Mitchell, and himself, that Stanton was of opinion that Ford had written any of the alleged forged papers?

7. And was he informed that Stanton had refused to give an opinion as to whether Ford had forged any of the papers, until he had an opportunity of taking the papers home and of studying them?

8. Did the defendants take reasonable care to ascertain the true facts of the case before Mitchell laid the information for forgery?

9. At the time the information for forgery was laid, was the defendant company or Mitchell, Wilson, or Allen actuated in doing so by malice?

9a. Were they or any of them actuated by malice whilst the charge of forgery was pending?

10. Were they or any of them actuated by malice when the information for stealing was laid?

11. Did Mitchell, at the time he laid the information for forgery, honestly believe the plaintiff guilty of forgery?

12. Did Mitchell, at the time he laid the information for stealing, honestly believe the plaintiff guilty of stealing?

13. Was the plaintiff guilty of the forgery charged?

14. Was the plaintiff guilty of the stealing charged?

15. If you consider the plaintiff entitled to damages, what sum do you award him?

(A) Down to the time of his arrest for forgery and remand?

(B) From the first remand down to the time that the charge of forgery was abandoned?

(C) In respect of the prosecution for stealing?

Owing to some oversight, the sheet of paper on which questions 6, 7, 8, 9, and 9a were written was not given to the jury, and the mistake was not discovered until after they had given their answers to the other questions, and had been discharged.

D. C.

1910

FORD

v.

CANADIAN  
EXPRESS CO.

Meredith, C.J.

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS CO.  
Meredith, C.J.

The jury answered questions 1 to 4 inclusive and question 10 in the affirmative; and questions 5, 5a, 11, 12, 13, and 14 in the negative; and they assessed the damages down to the first arrest for forgery and the first remand at \$1,500, the damages from the first remand down to the time when the charge of forgery was abandoned at \$250, and the damages in respect of the prosecution for stealing at \$750.

Upon motion for judgment on the findings of the jury, the Chief Justice, on the 30th October, 1909, in consequence of the jury's answer to question 12, "Did Mitchell, at the time he laid the information for stealing, honestly believe the plaintiff guilty of stealing?" ruled that there was an absence of reasonable and probable cause, and directed that, if the respondent so desired, judgment should be entered in his favour for the \$750, the damages awarded in respect of the prosecution for theft, leaving him to go to trial again on the other issues; and that course has been adopted by the respondent.

From that judgment the present appeal is brought, and the following are the substantial grounds taken in support of the appeal:—

1. That absence of reasonable and probable cause was not shewn, and that the Chief Justice should have so ruled and have withdrawn the case from the jury.

2. That there was no evidence to warrant the submission to the jury of the question whether Mitchell, in doing what he did, was acting within the scope of his employment so as to make the appellants responsible for his action.

And, in the alternative, a new trial is asked for, on the grounds of misdirection and improper reception of evidence, and because questions were submitted to the jury, contrary, as it is contended, to the provisions of the Judicature Act.

Upon the argument counsel for the respondent expressed willingness to have the judgment set aside and the whole case retried, but to this counsel for the appellants refused to agree, claiming that the appeal should be allowed and the action dismissed.

If the law is as it was laid down by the majority of the Court of Appeal in *Hamilton v. Cousineau* (1892), 19 A.R. 203, it may be that the learned Chief Justice was right in leaving to the jury the question which he put to them as to the honest belief of Mitchell;



but I am of opinion that it is not, and that the effect of the decision of the Supreme Court in *Archibald v. McLaren* (1892), 21 S.C.R. 588, is to overrule that case and to settle the law, as far as the Courts of this Province are concerned, in accordance with the views expressed by Armour, C.J., and Street, J., in the Divisional Court, and the dissenting judgment of Burton, J.A., in the Court of Appeal, in the earlier case.

The question in *Hamilton v. Cousineau* was as to whether the defendant had exercised reasonable care to inform himself of the facts before he laid the information, and the question which it was unsuccessfully argued in *Archibald v. McLaren* should have been submitted to the jury was as to the honest belief by the defendant of the truth of the information upon which he acted in instituting criminal proceedings; but I apprehend that the same rule as to when it is proper to submit these questions must apply to both of them.

The effect of the decision in *Archibald v. McLaren* is thus referred to by Anglin, J., in *Still v. Hastings* (1907), 13 O.L.R. 322, at p. 324: "That this question" (*i.e.*, honest belief in the plaintiff's guilt) "is not always for the jury is made clear by the decision in *Archibald v. McLaren*, 21 S.C.R. 588, where, there being nothing to suggest want of belief by the defendant in the truth of the information upon which he acted in instituting criminal proceedings against the plaintiff, it was held by the Supreme Court of Canada that the trial Judge had properly assumed such belief to exist and had thereupon rightly nonsuited, on the ground that absence of reasonable and probable cause was not shewn;" and in that view I entirely agree, as I also do with the views of Armour, C.J., Street, J., and Burton, J.A., in *Hamilton v. Cousineau*, as to when it is proper to leave to the jury the question as to the exercise of reasonable care.

In *Abrath v. North Eastern R.W. Co.* (1883), 11 Q.B.D. 79, 440, (1886), 11 App. Cas. 247, Cave, J., at the trial, left to the jury the questions of reasonable care and honest belief, and they have often been spoken of as proper questions to be submitted to the jury in actions for malicious prosecution on the issue as to want of reasonable and probable cause, but such a statement, if it means that they should be left to the jury in every case, is too wide, and warranted neither by principle nor by authority. It is, I think, reasonably clear from the speeches of the Earl of Selborne, of Lord Watson,

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS Co.  
Meredith, C.J.

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS CO.  
Meredith, C.J.

and of Lord Bramwell, that their view was the same as that expressed in the Supreme Court of Canada in *Archibald v. McLaren*. The Earl of Selborne said: "So far from thinking that there is a preponderance of evidence against reasonable and probable cause, my doubt is rather on the other side, whether on the whole evidence there was anything to go to the jury in favour of that conclusion" (*i.e.*, that reasonable care was not used): p. 250. Lord Watson concurred in these observations, and added, "I entertain considerable doubt whether there was any evidence to go to the jury:" p. 250. And Lord Bramwell doubted "very much whether Cave, J., needed to have left to the jury the question whether reasonable care had been used;" adding, "I doubt it very much indeed:" p. 254.

I come now to consider whether there was anything in the evidence to warrant the submission to the jury of the question as to honest belief, which was answered in favour of the respondent, or the question as to the exercise of reasonable care to ascertain the true facts, which was not answered?

In stating what I take to be the undisputed facts appearing in evidence, I eliminate everything as to which there is a semblance of controversy, and will treat every controverted matter as if it had been found against the appellants.

The respondent had been, up to the beginning of 1908, a clerk in the office of White & Co., fruit merchants, carrying on business in Toronto, and they had been in the habit of obtaining from the appellant company's office in Toronto books of money orders for use in making remittances in connection with their business. These orders were issued in blank, but were signed by the proper officers of the company, and became completed instruments when signed by White & Co., who were constituted agents of the company for the purpose of their issue.

On the 11th August, 1908, a person pretending to be Cowan, a clerk in the office of White & Co., presented at the Toronto office of the appellant company an order purporting to be signed by White & Co. "per Despard," and, upon presentation of the order, a book containing twenty money orders was given to him, for which he signed a receipt in the name of White & Co. "per Cowan."

The order which he presented was written on a half sheet of

letter paper of White & Co., having their printed heading upon it, and reads as follows:—

“August 11, 1908.

“Please give Mr. Cowan the book of orders on our account about which I just telephoned you and oblige,

“White & Co. Ltd.

“Despard.”

Despard was the manager of White & Co.'s business.

Before the book was called for, Mitchell, the Toronto agent of the company, had received a message by telephone, purporting to come from Despard, asking that a man should be sent to White & Co.'s with a book of money orders, to which Mitchell had replied that a man would not be in for an hour, upon which his interlocutor stated that “they” could not wait an hour, and asked whether, if a man were sent to the company's office, he would be given a book, to which Mitchell replied that he would not, unless the man had a written order for it.

Shortly afterwards White & Co. were applied to for “the proceeds of the book,” when it was discovered that they had had no communication with the company as to the book, and had not sent any one for or received it, and that the order which had been presented and the signature to the receipt which had been given for the book were forgeries, the names of both White & Co. and Cowan being forged.

Upon this discovery being made, Mitchell set about finding out by whom the fraud and forgeries had been committed, and with that object saw Despard and discussed with him what had occurred. Despard's attention was called to the fact that the order for the book was written on White & Co.'s letter-head, and he was asked by Mitchell whom he suspected, and, according to Mitchell's testimony—and his statement in this respect was not controverted—Despard gave him the names of two persons who, he thought, might be implicated.

Mitchell followed this suggestion for “a couple of days” without any result, and on the night of the second day inquired by telephone of the company's head office in Montreal whether any of the money orders had been presented and paid, and asked, if any had been, that they be sent to him, and the same night telegraphed to Detective Rogers of the provincial police force that he would like to see him the next morning.

D. C.

1910

FORD

v.

CANADIAN  
EXPRESS CO.

Meredith, C.J.

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS CO.  
Meredith, C.J.

The money orders, it should be mentioned, are payable at any of the offices of the company in Canada, at all events, and at certain places in Europe designated in the orders.

Detective Rogers came to the company's office as requested, and he and Mitchell, accompanied by Allen, the district superintendent of the company, went to the office of White & Co., Mitchell taking with him the money orders that had been presented and paid and the receipt that had been given for the book, which he shewed to Despard.

Despard's account of what he then did and said is given on p. 115 of the shorthand notes. His statement is: "I looked it over pretty carefully, and they asked me if I thought there was anybody in our office that I could identify it as their handwriting. I said, 'I think that resembles Ford's writing very much.'" And later on, in reply to another question (p. 115): "I said there would be plenty of Ford's writing up in our office, and they could verify it by Ford. I said it looked very similar to Ford's writing, and he was previously in our employ, and the name of a young fellow was brought up at that time, but I said it did not resemble his writing at all."

On the occasion of this interview or shortly after it, Mitchell obtained from Despard a "binder," containing a large number of account sales, some if not all of which were in the respondent's handwriting.

McLean, a book-keeper of White & Co., testified that he, with Mitchell and Allen, compared the handwriting in exhibit 6 (a bundle of seven of the orders which had been filled up and presented and paid) with the respondent's genuine handwriting, and expressed to them the opinion that some of the letters in the exhibit were very like the respondent's.

Rogers then advised getting the opinion of an expert in handwriting, and Mitchell and Allen went at once to a Mr. Stanton for the purpose of getting his opinion, and Rogers met them there. Stanton was shewn the money orders that had been presented and paid, or some of them, and the receipt for the book was shewn to him, as well as samples of the respondent's handwriting. According to Stanton's testimony, after comparing these he called the attention of Rogers and Mitchell and a third person who was with them to "two or three different letters in Ford's handwriting that resembled the same letters in the order for the book," adding, as he testified:



"But I am not giving an opinion; I simply state that these two or three letters are similarly formed, and, if you will allow me to take the documents, I will make you a report and give you an opinion." And later on, in answer to the question (p. 28), "But you thought there was a resemblance between the admitted handwriting of the plaintiff and these documents?" Stanton replied, "Certainly, and I thought by study I might find more." And to the further question, "And that is the position you left it in to these gentlemen?" he answered, "I was very careful to leave it in that position."

According to the testimony of Rogers, and his statement was not controverted by Stanton, he at this interview informed Stanton that he was going to see Mr. Corley, the Crown Attorney.

Mitchell, accompanied by Rogers, then went to Mr. Corley's office, and, according to the latter's testimony, in the statement of the case made to him it was represented that the respondent had been in the employment of a firm whose name had been used to get the book, and that Stanton thought that the signature to the receipt was in the same handwriting as some admitted handwriting of the respondent, and that he thought it was a proper case for taking that course, and that he then gave a direction for the issue of a warrant for the arrest of the respondent for forgery.

Upon cross-examination, in answer to the question (p. 15), "I am told that, as far as they went, they said the expert thought it resembled the handwriting of the accused, and took away papers for the purpose of considering it. That was, I understand it, the position of affairs at the time they came to you?" Mr. Corley replied: "It may have been. I cannot say."

These are the material facts bearing upon the prosecution for forgery, either undisputed or as put most strongly against the company in the testimony; and the question is, whether the learned Chief Justice should have ruled that the respondent had shewn an absence of reasonable and probable cause for the prosecution.

In my opinion, his ruling should have been in favour of the appellant company.

A bold and deliberately planned fraud and forgery had been committed. All the circumstances pointed to the conclusion that the person who had planned and carried it out was one who had access to the office of White & Co., and was familiar with their

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS Co.  
Meredith, C.J.

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS CO.  
Meredith, C.J.

mode of doing business with the appellant company, and knew the name of their manager, and that Cowan was in their employment. The opinions of Despard and McLean as to the handwriting pointed to the conclusion that an employee of White & Co.—the respondent—was the guilty man, and what was said by Stanton to Mitchell and Rogers was calculated to strengthen the opinion which the latter had apparently reached as to the author of the fraud and forgery. Rogers, though not called in in his official capacity, was a police officer of long experience, and Mitchell would naturally depend upon his advice.

It was important in the interest of justice that prompt action should be taken for the arrest of the suspected offender, and important also in the interest of the appellant company that a stop should be put to the further fraudulent use of the money orders by the person who had got possession of them; and it would, in my judgment, tend to hamper the due administration of criminal justice if, upon the facts and information of which Mitchell was in possession and upon which he proceeded, it should be held that he acted without reasonable and probable cause in laying the information charging the respondent with forgery.

In my opinion, nothing appeared upon the evidence justifying even the suspicion, much less a finding, that Mitchell did not, "at the time he laid the information for forgery, honestly believe the plaintiff guilty of forgery." The reasons which I have mentioned pointed to his guilt; so far as appeared, Mitchell did not know him even by sight, and no motive for his making a false charge against him is suggested.

Mitchell's superior officers, Wilson, the general agent, and Allen, the district superintendent, were cognizant of what was being done, and apparently approved of it, and they too, as well as Rogers, seem to have thought that the respondent was the guilty man, and that the proper course was being taken by Mitchell.

The fact—and for the purpose of the motion I assume it to be the fact—that Corley was told by Mitchell, or by Rogers in presence of Mitchell, that Stanton was of opinion that the forged writing was the respondent's, while material to the defence that the action taken against the respondent was not that of Mitchell or his employers but of the Crown Attorney, has no bearing on the issue as to reasonable and probable cause.

Nor was there, in my opinion, anything which warranted the submission to the jury of the question as to the appellant company having taken "reasonable care to ascertain the true facts of the case before Mitchell laid the information for forgery."

"A case of *primâ facie* negligence on the part of Mitchell or the appellant company of some inquiry which should have been made, or some step which should have been taken, by the prosecutor if he had acted as a reasonable man would act, and which, if made or taken, would have shewn that the information could not properly be laid," must be made out to warrant the submission of such a question to the jury: *per* Street, J., in *Hamilton v. Cousineau*, 19 A.R. at p. 210, concurred in by Burton, J.A., at p. 230; and, in my opinion, no such *primâ facie* case was made out. As put by a learned writer: "A man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction or even of the best evidence which he might obtain by further inquiry. It does not follow that, because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so."

As has been seen, the respondent claims damages for his remand on the charge of forgery, and in *Fancourt v. Heaven* (1909), 18 O.L.R. 492, the plaintiff recovered such damages. The circumstances of the case at bar are different from those which appeared in that case. It was plain there that a mistake had been made, and the ground of the decision was that, though the prosecution was not improperly begun, the proceedings against the plaintiff were not discontinued when the mistake became known to the defendant.

In the case at bar, while the prosecution was not discontinued when Stanton gave an opinion, as he afterwards did, that the forged documents were not in the handwriting of the respondent, there is nothing to shew when that opinion was given, further than that it was before the 2nd October, when the charge of forgery was withdrawn.

In the meantime the respondent had been arrested on the charge of forgery, and had been identified by Walter Mackenzie, a clerk in the company's office, as the person to whom he had delivered the book of money orders, and by Thomas Noble, another clerk in the company's office, as the man who signed the receipt

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS Co.  
Meredith, C.J.

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS CO.  
Meredith, C.J.

for the book. Mackenzie and Noble had gone together to the Police Court for the purpose of seeing if they could identify the man who had got the book and signed the receipt, and they picked out from a number of men there the respondent as that man.

This information was in the possession of Mitchell when the information for theft was laid, which was on the 2nd October.

Mackie, a detective in whose hands the case had been put, had also in the meantime (on the 29th August) searched the respondent's house, and found there two letter-heads of White & Co., upon which were the genuine stamp of the firm, with the name of Despard, as manager, signed to it—his genuine signature—and these, according to Despard's testimony, the respondent had no right to have in his possession. Mackie also found there a bundle of papers, exhibit 11.

These facts were also known to Mitchell when the information for theft was laid.

Stanton having reported that, in his opinion, the forged documents were not in the handwriting of the respondent, the Crown Attorney appears to have come to the conclusion that the prosecution for forgery could not be sustained, but that, as the respondent had been identified as the person who had obtained the book on the forged order, it was proper that a charge of stealing the orders which the book contained should be preferred against him, and, at the instance of the Crown-Attorney, an information for the theft was, on the 2nd October, laid by Mitchell against the respondent.

It is difficult to understand why this course should have been thought necessary. If the respondent had stolen the book of orders, that is, fraudulently obtained them by means of a forged order, he might have been properly convicted of uttering the forged order, for proof of the guilty knowledge essential to establish the one offence would equally have established the other.

I do not see how any different conclusion can be reached as to the prosecution for theft than that to which I have come with regard to the prosecution for forgery, that it should have been ruled that the respondent had failed to establish want of reasonable and probable cause.

Though Stanton's opinion was that neither the order nor the receipt had been forged by the respondent, there was the evidence of Mackenzie and Noble that the respondent was the person who presented the forged order and received the book, and it is im-



possible, in my opinion, to say that Mitchell, acting after this identification and after the discovery made by Mackie, and in accordance with the advice, if not the direction, of the Crown Attorney, acted without reasonable and probable cause in laying the information for theft.

In my opinion, the appeal should be allowed with costs, the judgment and order of the learned Chief Justice should be reversed, and there should be substituted for them judgment dismissing the action with costs.

D. C.  
1910  
FORD  
v.  
CANADIAN  
EXPRESS Co.  
Meredith, C.J.

[DIVISIONAL COURT.]

HAIGH v. TORONTO R.W. Co.

D. C.  
1910  
July 28.

*Street Railways—Injury to Passenger Alighting from Car—Unauthorized Signal to Start—Negligence—Undisputed Facts—Inference—Questions for Jury—Defective System—Pleading—Amendment—New Trial.*

The plaintiff was a passenger upon a crowded open car of the defendants, who operated an electric railway upon the streets of a city. The plaintiff wished to alight at N. street, and the car stopped there, upon the signal of the conductor, who was upon the foot-board, engaged in collecting fares. While the plaintiff was in the act of alighting, the car was started, upon a signal given by an unauthorized person who was standing on the rear platform, and the plaintiff was thrown down and injured. The car had previously, on the same trip, been started, after a stop, by the same unauthorized person, and the conductor had not interfered or reprimanded him. The plaintiff alleged negligence in starting the car too soon and in overcrowding the car so that the conductor was not able to perform his duties, and claimed damages for her injuries. The facts were not in dispute, and the trial Judge withdrew the case from the jury, and gave judgment for the defendants:—

*Held*, that it did not follow that, because there were no facts in dispute, the matter to be decided was a pure question of law; it might be for the jury to say what they found to be the true inference from these facts, *e.g.*, whether there was negligence causing the accident; there was at least one question which should have been submitted to the jury, *viz.*, whether there was any negligence of the conductor in failing to hear or to countermand the unauthorized signal for starting the car, in time to have prevented injury to the plaintiff, particularly in view of what had previously taken place.

And *semble*, that there was at least one other question which might be submitted to the jury, *viz.*, whether the defendants failed in their duty in not taking due precautions to prevent the starting of the car through the unauthorized act of a passenger in ringing the bell, which might involve the question (not raised by the pleadings) whether the system adopted by the defendants was defective.

*Nichols v. Lynn and Boston R.R. Co.* (1897), 168 Mass. 528, approved and followed.

*Held*, therefore, that there should be a new trial, with leave to the plaintiff to amend as she might be advised; RIDDELL, J., dissenting.

*Per* RIDDELL, J., that the plaintiff had failed to establish a case of negligence as charged; and, if she wished to allege a defective system, could only be allowed to do so in a fresh action, or in this action upon amendment, payment of costs, and being confined to the new cause of action.

Judgment of the County Court of the County of York reversed.

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.

APPEAL by the plaintiff from the judgment of MORGAN, one of the Junior Judges of the County Court of the County of York, by whom, with a jury, this action was tried.

The following statement of the facts is taken from the judgment of BRITTON, J.:—

The plaintiff on the 25th June, 1909, was a passenger on one of the defendants' cars going east on King street. She desired to get off at Niagara street, that being the street upon which she then resided.

As the car approached Niagara street, the conductor gave a signal to stop at that street. The car did stop there, and the plaintiff proceeded to alight; whilst she was on the step of the car, a signal was given for the car to proceed, and it started before the plaintiff had alighted or had time to alight therefrom. The plaintiff was thrown down and injured.

This action is for damages for her injuries. The plaintiff charges negligence on the part of the defendants as follows:—

(a) That the conductor gave the signal to start the car before the plaintiff had alighted and while she was ready to alight.

(b) In causing the said car to proceed without fully ascertaining whether the plaintiff was properly clear of the car or not.

(c) In allowing the said car to become so crowded as to render it impossible for the conductor properly to perform the duties intrusted to him, and this negligence contributed to the accident to the plaintiff.

Upon the evidence these facts appeared. The car was crowded, its capacity was 70 passengers, and it had on board about 100. Although the conductor gave the signal to stop at Niagara street, the signal to start the car, after that stop, was given by a passenger, without any authority from the conductor. Prior to starting the car at Niagara street on the same trip, the same car had stopped at Shaw street, and had been started by a passenger giving the signal from the rear platform. The conductor knew this, and took no steps to prevent its repetition.

The conductor's evidence is in part as follows:—

Arthur Ederby, sworn:—

Q. You are a conductor on the Toronto Railway? A. Yes.

Q. And you were the conductor on the car on which the accident happened to Mrs. Haigh? A. Yes.

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.

Q. Your car was on King running east, was it? A. Yes.

Q. Starting at Roncesvalles avenue? A. Yes.

Q. We are told that a number of people got on and filled the car upon Dufferin street: is that right? A. Yes, we had a nice load, but we had room for more.

Q. People were standing in the aisle? A. Yes.

Q. And all the seats were occupied? A. Yes.

Q. Were there any stops between Dufferin and Niagara streets? A. Yes, we had two stops, one at Shaw street and the other at Strachan avenue.

Q. And did people get on and off there too? A. Yes, there were three or four got on at Shaw street, and I think it was two at Strachan avenue, and there were three or four got off at Strachan avenue.

Q. When you got to Niagara street, who rang the bell to stop the car? A. I rang the bell.

Q. Any request to somebody or what? A. No, somebody requested me to stop at Niagara street.

Q. And the car stopped there? A. The car did stop.

Q. When the car was standing there, where were you? A. About the second seat from the front, collecting fares.

Q. Were you in the aisle or on the steps? A. On the steps.

Q. Were there any other people on the steps besides? A. No.

Q. What people there were, were inside in the aisles and on the seats? A. Yes.

Q. When the car stopped, did you see Mr. and Mrs. Haigh get off? A. I saw Mr. Haigh get off, and then I saw Mrs. Haigh getting off, and I was waiting for her to get off.

Q. She was how far from you? A. She was about three seats from me. She was about the centre of the car.

Q. What happened to the car as she was getting out? A. She had got one leg on the bottom step, when somebody rang the bell for the car to go ahead, and the car went ahead, and I immediately rang the three bells for the car to stop, and the car stopped. Then Mrs. Haigh fell, and her husband caught her, and she seemed to faint.

Q. Were you the man that rang the bell? A. No.

Q. After you rang the three bells and the car stopped, what did you do? A. Then I got off to see if the lady was hurt. I got

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.

off and got the man's name that rung the bell, and I handed him over to a policeman, P. C. Ward.

Q. Where did you find the man was? A. On the back platform.

Q. Were the policemen on the back platform? A. I could not say. They were somewhere on the car.

Q. How many people were on the back platform? A. I suppose fifteen or sixteen.

Q. Was it one of the big platforms? A. Yes.

Q. Were they a perfectly orderly crowd? A. Yes, quite.

Q. Did you see the man just after he rang the bell? A. Yes; I asked him if he was the man that rang the bell, and he said, "Yes, I am."

Q. Who pointed him out to you? A. The man that stood on the back.

Q. Was the man who pulled the bell perfectly sober? A. Yes.

Q. Behaving himself? A. Yes.

Q. Did you instruct him to ring the bell? A. No.

Q. You had been attending to the bell up to that time? A. Yes.

Q. How many people were on your car after you left Dufferin street? A. I suppose somewhere between 80 and 90.

Q. You remember being examined in this case? A. Yes.

Q. You were asked—see if you remember this—"What was the seating capacity of the car that night?"

His Honour: Are you charging that overcrowding is negligence?

Mr. O'Donoghue: Yes.

His Honour: I think the street railway company would have to be indicted every day in the week if that is negligence.

Mr. O'Donoghue: You were asked, "How many will you say there were?" and your answer was, "Not more than one hundred." Is that right? A. That is right.

Q. "And your stated capacity was 70? Answer, yes"? A. Yes.

Q. So that in all the aisles you had people standing? A. Yes.

Q. At that time? A. Yes.

Q. "At the time you arrived at Niagara street? Answer, yes." That is right? A. Yes.

Q. Did you have to get into the aisles at any time to collect fares? A. No.

Q. Reach away in? A. Yes.

Q. You did not have to get in at any time? A. No.



Q. After Dufferin street, where did you strike next? A. Shaw street.

Q. Where were you on the car at that time? A. About the centre of the car.

Q. Did you ring the bell for the car to proceed there? A. Some one else rang it at Shaw street.

Q. What did you say to the man who rang the bell there? A. I looked back, and I saw two policemen there. I thought one of them had rung it, or I would have gone back and seen who did it.

Q. You did not go back? A. No, I went on collecting fares.

Q. The next stop was where? A. Strachan avenue.

Q. A large part of the crowd was still with you? A. Yes.

Q. A few more got on? A. Yes.

Q. The back platform was pretty well crowded? A. Yes, there were fifteen or sixteen, I say.

After the evidence was all in the following is the record of what took place:—

His Honour: Then, Mr. McCarthy, I suppose in a case of this kind there will be some questions put to the jury?

Mr. McCarthy: In the first place I take the objection that no action for negligence lies against the company for the act of a passenger, providing that passenger was acting properly; and there was no occasion for the conductor to suppose that that man was usurping his duties in ringing the bell. No one had any business to do so. No one was authorized to do it. Of course, I say there is no liability as far as the company was concerned.

His Honour: I do not think that. There does not seem to be any dispute in this case at all.

Mr. McCarthy: We admit that the car started when Mrs. Haigh was getting off, and we say this man rang the bell, as he says he did. And I would go as far as to admit that the car was crowded—that the seats were full and that the aisle was full. Admitting all this, it occurred to me that this was a question of law.

His Honour: Yes; I do not think, Mr. O'Donoghue, there is anything to go to the jury except to assess damages.

Mr. O'Donoghue: Probably not.

His Honour: I feel inclined to do this. I feel inclined to say that it is not necessary to let the case go to the jury except to assess damages; because the determination of this case really depends

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.

upon the law as upon a stated case of admitted facts, the facts admitted being that the car was full to the utmost seating capacity, and that people to the number of between twenty and twenty-five were standing in the aisles of the car at various parts of the car; that the rear platform contained fifteen or sixteen persons; that the car stopped properly at Shaw street upon the bell being rung; that the bell was rung there by somebody at the rear of the car without the conductor's knowledge, without his consent or request; that the conductor did not then interpose, because he supposed that one of the two policemen who were on the car might possibly have done it; that the car stopped in due course at Niagara street; that after the plaintiff's husband had got off the car, and as she was in the act of getting off, the bell was rung to proceed; that the bell was rung by a Mr. Davis at the rear end of the car without the conductor's knowledge, without his procurement, and without his having the idea that the bell was going to be rung, he (the conductor) being at that moment waiting for the plaintiff to get off, seeing her in the act of getting off; that the moment the bell was rung to proceed, the conductor immediately rang three bells for the car to stop, but before the car did stop Mrs. Haigh was thrown to the ground and injured. Upon that statement of facts (which I think are all the facts material to be found, and all the facts that I think the jury could find) it becomes a pure matter of law to say what the liability of the company is. The conclusion I shall reach on the question, in favour of the company, may be reversed on appeal. I will simply ask the jury to assess the damages of the plaintiff, so that there may not be another trial in case I should decide in favour of the company, and the Court think I am wrong.

Mr. O'Donoghue: You stated that the conductor had not requested the man to ring the bell. I might also state that he raised no objection. There is a question whether he adopted the act.

His Honour: How could he raise an objection? It was done without his knowledge.

Mr. O'Donoghue: But the first time.

His Honour: I have said that the first time the bell was rung at Shaw street the conductor did not interpose to take any objection to the act because he thought it had been done by one of these two policemen.

Mr. O'Donoghue: But of course they have no authority to ring the bell at all.

His Honour: No, of course not. I have stated that as a fact established.

Mr. O'Donoghue: Then there is another fact that they might be asked a question upon—as to whether the car was overcrowded.

His Honour: I think the jury have no right to say that. I will tell the Divisional Court, if it goes there, that the car was filled in every part and persons standing in every aisle.

Mr. O'Donoghue: I still submit it is for the jury to say whether that was an overcrowding which prevented him performing his duty.

His Honour: No, I will not ask that. The Court can decide that.

His Honour then charged the jury upon the damages—the only thing left to them.

After the jury retired the record proceeds:—

His Honour: Now, Mr. O'Donoghue, I may as well tell you what I think as to the plaintiff's right to recover. I have not any hesitation in saying that, upon the facts as developed in the evidence, as I have stated them in withdrawing the consideration of the liability from the jury, I do not think that any action lies against the company on the question of overcrowding. It is quite clear that the seating capacity of the car was fully occupied. It is also quite clear that, in addition to the people sitting in the seats, there were from twenty to twenty-five persons in the car, distributed from end to end of it, standing in the aisles. This woman has said—and it is not contradicted—that there were in the aisles, between her seat and the one in front of her, four persons standing, and she says that that was an embarrassment to her in getting off the car. Having regard to all those considerations, I am unable to find that the conductor's permitting—or rather, I should say, being unable to prevent—the citizens of Toronto from crowding upon an already filled car, is an act of negligence for which the street railway company is liable. Then, I think I must find, upon the law, that, the car having started upon the sound of two bells—the starting signal—the motor-man was guilty of no negligence in starting the car—that the bell was rung, not by the conductor nor by his procurement nor with his knowledge, it was rung by a stranger to the conductor, standing at the rear end of the car. The conductor, being then at the extreme front of the car, could not be supposed to have observation of what

D. C.

1910

HAIGH

v.

TORONTO  
R.W. Co.

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.

was going on at the rear. The car having started, therefore, not at the instance of an officer of the company in charge of it, the company would not be liable. They could not be liable for the act of a perfect stranger doing something that he had no business to do. The mere fact that it had been done once before on the same trip by somebody else, and the conductor not having endeavoured to find out who had done it, and prohibited a repetition of it, is not, in my judgment, sufficient to make the subsequent act which caused the injury an act of negligence on the part of the company. On the whole case, I think the action must be dismissed, and dismissed (if the company exact it) with costs.

Mr. O'Donoghue: I had a couple of cases on the liability of the company.

His Honour: Well, if you have, I would like to see them.

Mr. O'Donoghue: I have one exactly in point. I did not like to interrupt you.

His Honour: I can recall all that if necessary.

Mr. O'Donoghue: This was a case of *Nichols v. Lynn and Boston R.R. Co.* (1897), 168 Mass. 528. What occurred at Shaw street should have put this man on his guard that the same thing should not happen at Niagara street: Booth's Law of Street Railways, sec. 349. He may have thought he was a little behind time, and therefore not objected.

His Honour: That does not change my view one bit—that American case. I do not think the question ought to be left to the jury. I think it a pure question of law. I am afraid the action must be dismissed, and, if I am wrong, it will be for the Divisional Court to say so.

April 6. The plaintiff's appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*W. T. J. Lee*, for the plaintiff. Evidence of negligence on the part of the defendants was adduced by the plaintiff at the trial which the jury should have been asked to pass upon, and the trial Judge should not have dismissed the action, but should have allowed the jury to find whether there was any, and if so what, negligence. The negligence consisted in not giving the passenger sufficient time to alight before starting, in allowing the car to be so crowded that the conductor could not properly perform his duties, and in not taking due precautions to prevent the starting of the car through



the unauthorized act of a passenger. The case of *Nichols v. Lynn and Boston R.R. Co.*, 168 Mass. 528, is almost identical with this, and I submit that the reasoning therein is applicable here. See also *North Chicago Street R.R. Co. v. Cook* (1893), 145 Ill. 551. On the question of the length of time which should be given a passenger to alight, I refer to Booth's Law of Street Railways, secs. 349, 350; *Washington and Georgetown R.R. Co. v. Grant* (1897), 11 Tucker (Dist. of Col. App.) 107. On the question of overcrowding, see Nellis on Street Surface Railroads, p. 467. The company is responsible even where the misconduct of a third party intervenes: *Eaton v. Boston and Lowell R.R. Co.* (1866), 11 Allen 500; Rapalje & Mack's Digest of Railway Law, vol. 6, p. 795. The jury should have been asked to find whether there was negligence on the part of the conductor in failing to prevent a repetition of the unauthorized giving of the starting signal, which had taken place before at Shaw street.

*D. L. McCarthy*, K.C., for the defendants. The learned County Court Judge was right in withdrawing the case from the jury, and entering judgment for the defendants. All the material facts were admitted, and it was a pure matter of law what the liability, if any, of the company was. There was no negligence on the part of the company. The trial Judge was right in refusing to submit to the jury the question of whether there was an overcrowding which prevented the conductor from doing his duty, because there was nothing to prevent the conductor doing anything he might be called upon to do. The defendants are not responsible for the unauthorized act of a passenger in starting the car: *East Indian R.W. Co. v. Kalidas Mukerjee*, [1901] A.C. 396. The fact that the car had been started by a passenger once before, and that the conductor had not endeavoured to find out who had done it, and prohibited a repetition of it, does not make the subsequent act which caused the injury an act of negligence on the part of the company: *Canadian Pacific R.W. Co. v. Blain* (1903), 34 S.C.R. 74, 79, 80. I had evidence ready at the trial as to the propriety of the system, if the system had been attacked, but it was not.

July 28. BRITTON, J. (after setting out the facts as above):—The decision of the learned Judge was, I think, erroneous. The action was being tried by a jury, and should not have been dismissed as it was.

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.  
Britton, J.

The plaintiff failed in her assignment of negligence against the conductor for ringing the bell to start the car after stopping at Niagara street, but that was not the whole case. There was, in my opinion, evidence of negligence in so managing the car as to permit a passenger to signal to start it, and, as in this case, to start it when a passenger was in the act of alighting. After the signal to start was given, the conductor says, he countermanded it as soon as possible. Was that so? Should he not, either by bell or voice, have been able to prevent the motorman acting upon an unauthorized signal to start.

The signal to start a car, after stopping to allow passengers to get off, is the one thing full of danger. It requires to be carefully watched. Any passenger desiring to get off can signal to stop. His liberty to do this is recognized by the defendants and their conductors. Even if it is a question of defect in the system, that is to say, permitting cars to be so crowded that the conductor's time is fully occupied in collecting fares, leaving unauthorized passengers the opportunity to give a signal to start, there is evidence of negligence which, in my opinion, should have been submitted to the jury.

The American case of *Nichols v. Lynn and Boston R.R. Co.*, 168 Mass. 528, cited by Mr. O'Donoghue at the trial, is very like the present case, and, although that is not an authority binding here, I agree with the reasons given in the considered judgment of the Court. There was evidence given as to the number of passengers, and that several of the passengers were standing on the rear platform. "At Breed street there was a regular stopping-place . . . and there was no need to ring the bell for it to stop there, and the conductor did not ring the bell on this occasion . . . but a passenger upon the rear platform rang it. The plaintiff had told the conductor that she wished to be left there, and when the car stopped he called 'Breed street,' and nodded to her. He was inside the car collecting fares. . . . She walked to the rear door, passed out, and was in the act of stepping from the platform to the ground, when the car started up suddenly, and she was swung off, but held on and was dragged a little way," and was injured. The evidence left no doubt that the same passenger who rang the bell for the car to stop, also rang it for the car to start again. The conductor testified that he did not give the passenger any authority to signal to stop or start, and that he did

not hear either signal. He also testified that "sometimes a passenger has rung the bell to start; there are people who make themselves officious upon the car; it is not a common occurrence in running a car." Here, as in that case, the jury should have been asked if there was any lack of due precautions, under the circumstances, to prevent the starting of the car through the unauthorized act of a passenger in ringing the bell. "The defendants are bound to use the utmost care consistent with the nature and extent of their business to guard against all dangers which they could reasonably anticipate; and if they failed in this duty, they are responsible for the consequence of their neglect, although the negligence or misconduct of the passenger who rang the bell contributed to the injury."

There was evidence on which the jury might have found that the defendants failed in their duty in allowing the car to be started up as it was, or in not taking greater precaution to prevent its being so started up, before the plaintiff had time to alight.

It appears to me that there might well be instructions to the motorman, in reference to starting upon signal, not to start so suddenly as to prevent the immediate countermand of an unauthorized signal to start. The danger of being exposed to accident from unauthorized signals given by officious persons is something a passenger ought not to be asked to incur.

In my opinion, there should be a new trial—costs of the former trial and costs of the appeal to be costs in the cause—with liberty to amend the pleadings as the parties may desire.

FALCONBRIDGE, C.J.:—The facts are very fully set out in the judgment of my brother Britton, and they are not in dispute.

The only question for us to consider is, whether the matter was competent to be considered by the jury on the question of negligence, or whether the learned Judge was right in withdrawing the case from the jury and entering judgment for the defendants. The circumstance that there are no facts in dispute does not necessarily involve the proposition that the matter to be decided is a pure question of law, and therefore one to be determined by the Judge alone. It may be for the jury to say what they find to be the true inference to be drawn, *e.g.*, whether there was negligence causing the accident.

The facts in *Nichols v. Lynn and Boston R.R. Co.*, 168 Mass. 528,

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.  
Britton, J.

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.  
Falconbridge,  
O.J.

are almost identical. The opinion of the Supreme Judicial Court of Massachusetts—a strong Court—while it does not bind me judicially, commends itself to my personal and individual judgment. There is no suggestion that the plaintiff was not exercising due care; and I am of the opinion that there was at least one question which ought to have been submitted to the jury on the evidence, *viz.*, whether there was any negligence of the conductor in failing to hear or to countermand the unauthorized signal for starting the car, in time to have prevented injury to the plaintiff, particularly in view of what had already taken place at Shaw street. See also the judgment of the Supreme Court of Illinois in *North Chicago Street R.R. Co. v. Cook*, 145 Ill. 551.

It may be that there is at least one other question which might be submitted to the jury, *viz.*, whether the defendants failed in their duty in not taking due precautions to prevent the starting of the car through the unauthorized act of a passenger in ringing the bell. This may involve the question of whether the system adopted by the defendants was proper or was defective. Counsel for the defendants stated that he was ready at the trial with evidence as to the propriety of the system if it had been attacked. But, as there must, in the view that the majority of the Court takes on the other question, be a new trial, the plaintiff has leave to amend the pleadings as she may be advised—the defendants, of course, having the same liberty.

There will be a new trial. Costs of the former trial and of this appeal to be costs in the cause to the successful party.

On the general question as the opportunity to be given to a passenger leaving a car in safety, I refer to Booth's *Law of Street Railways*, secs. 349 and 350.

RIDDELL, J. (dissenting):—The plaintiff sued the defendants for damages, and in her statement of claim alleged that when on a car of the defendants she gave a signal to the conductor to stop at Niagara street, that the car did stop, that she proceeded to alight, and, whilst she was on the steps of the car, the conductor gave a signal to start, and the car did start, throwing her down. She alleges negligence also in the company allowing the car to be so crowded as that it became impossible for the conductor properly to perform his duties.

At the trial the facts appeared: that the plaintiff was in a car



going east; that the car was crowded; that the bell to go ahead was rung at Shaw street by some one not the conductor, perhaps one Davis; that the conductor supposed that one of the two policemen then at the rear of the car had rung the bell, and so did not interfere or complain; that, the car being properly brought to a standstill at Niagara street, the plaintiff was getting off, when the bell to go ahead was rung by Davis on the rear of the car. The conductor had no time to countermand the bell before the plaintiff was thrown down.

The jury were asked to assess damages only, and the learned trial Judge, Judge Morgan, disposed of the remainder of the case himself, with the assent of counsel for the plaintiff, except that counsel for the plaintiff asked that the jury should find whether there was an overcrowding which prevented the conductor from doing his duty. This the learned Judge refused, and I think rightly. Though there was overcrowding—"the car was filled in every part and persons standing in every aisle"—there was nothing to prevent the conductor doing anything he might be called upon to do; the car was open and a running board along the side. The jury assessed the damages at \$250; and the learned Judge dismissed the action.

At the trial, we are informed by counsel for the defendants, he was ready with evidence as to the propriety of the system, if any case of attack on the system should be made—but, none being made, he did not consider it necessary or proper to offer this evidence. In this I think he was right.

There can, I think, be no question that the plaintiff has completely failed to establish a case as charged. Whether she could succeed if she were to plead defective system, I do not consider. The present action is upon other grounds, and any dismissal of it should be without prejudice to any action to be brought based upon a negligent or defective system. With such reservation, the appeal should be dismissed with costs.

If the plaintiff for any reason desires to avail herself of the present action, she may, instead of having the appeal dismissed, be allowed, upon paying the costs of the former trial and of this appeal, to amend the record claiming defective system and have such new claim tried. The present record, of course, remains disposed of in favour of the defendants. The plaintiff should have ten days in which to elect.

D. C.  
1910  
HAIGH  
v.  
TORONTO  
R.W. Co.  
Riddell, J.

## [DIVISIONAL COURT.]

## GOODALL V. CLARKE.

1910

May 11.

D. C.

1910

July 29.

*Damages—Sale and Conversion of Unlisted Shares—Measure of Damages—  
Evidence as to Value—Price Actually Realised—Price Realised by Others—  
Exceptional Circumstances—Estimate by Court Acting as Jury.*

The damages for the sale and conversion by the defendant of 20,000 shares of the capital stock of a mining company, unlisted and having no market value, to which the plaintiff was entitled under a contract with the defendant, were assessed by a Referee upon a reference at 40 cents a share, which was the highest price at which shares of the company had been sold. It appeared that the circumstances in regard to that sale were exceptional. Upon the defendant's appeal to a Judge, the damages were reduced to 26 cents a share, the price obtained by the defendant. Upon the plaintiff's appeal to a Divisional Court, the damages as reduced by the Judge were increased by the sum of \$1,500; the Court holding that it should act as a jury, and assess the damages at a fair sum, taking into consideration the fact of a sale at a higher price than that obtained by the defendant.

*Per CLUTE, J.*—The plaintiff never recognised the sale by the defendant, and only consented to take damages in lieu of the shares because, the shares being sold, he had no other remedy. The shares on the day the action was brought had no market value; and a jury would have to say what was a reasonable compensation for the loss of the shares.

*In re Bahia and San Francisco R.W. Co.* (1868), L.R. 3 Q.B. 584, followed.

*Michael v. Hart*, [1901] 2 K.B. 867, [1902] 1 K.B. 482, discussed.

*Per MIDDLETON, J.*—The defendant cannot escape liability beyond the amount received by him in a case of this kind, merely because he acted in good faith so far as the sale was concerned. Nor should he be held to account for the full price realised by another in exceptional circumstances. The value of the shares was left in doubt; and the Court should, as a jury, make a fair assessment.

Order of MEREDITH, C.J.C.P., varied.

THIS action was brought to enforce an agreement by the defendant for the assignment of certain shares.

The defendant, a solicitor, had borrowed some \$3,500 from the plaintiff, and on the 30th March, 1908, he borrowed a further sum of \$3,000, and, in consideration, assigned 50,000 out of 371,094 shares in the Lawson Mine Limited, then in Court in his name, and undertook to repay the loan in three months, with interest at seven per cent.

On the 14th December, 1908, the defendant signed and gave to the plaintiff a letter, addressed to the plaintiff, as follows: "I am indebted to you for \$5,549.12 advances beginning in April, 1908, with interest, the whole estimated at \$6,500. For this you have agreed to accept \$1,500 in cash and the equivalent of 20,000 shares stock in the Lawson Mine Limited. I, therefore, assign to you out of my interest one two hundred and fiftieth interest in the property or 20,000 shares in the event of my being compelled to accept such

shares. The shares to be non-assessable and free from deductions for treasury purposes. I also agree, in the event of succeeding substantially in the appeal to the Privy Council, to give you a bonus equal to half of the above. This is in substitution for the assignment of the 30th March, 1908. The property is the south-west quarter of the north half of lot 3 in 4 Coleman."

The action was based upon this document. The action was begun on the 27th March, 1909. On the 29th March the plaintiff obtained an injunction order restraining the defendant from disposing of his stock in the Lawson Mine Limited. On the 2nd April an order was made that upon payment into Court of \$5,000, to stand as security to satisfy the plaintiff's claim, the injunction should be dissolved. That sum was paid into Court. The defendant had, it appeared, sold and transferred his stock before that time.

The action was tried before RIDDELL, J., who found certain disputed facts in favour of the plaintiff, and held that the plaintiff was entitled to recover.

At the trial the plaintiff expressed his willingness to accept the \$5,000 paid into Court as in full satisfaction of his claim, after crediting \$5,100 already received by him, but the defendant refused to agree to this.

The defendant not being in a position to deliver the 20,000 shares or any interest in the property, specific performance was not adjudged by RIDDELL, J., but he directed a reference to determine the amount of damages to which the plaintiff was entitled: 1 O.W.N. 95.

His judgment was affirmed by a Divisional Court: 1 O.W.N. 288.

The reference was to George Kappele, an Official Referee, who made his report on the 8th April, 1910, assessing at the sum of \$8,000 the damages which the plaintiff had sustained by reason of the defendant's breach of the contract. The Referee also found that the defendant paid the plaintiff on the 24th March, 1909, the sum of \$5,100, which should be credited on the amount so assessed; and that the balance of \$2,900 should bear interest at the rate of five per cent. per annum from the 17th March, 1909, which was the date of the transfer of the defendant's shares in the Lawson Mine Limited.

The defendant appealed from the report.

1910  
GOODALL  
v.  
CLARKE.

Meredith, C.J.  
1910  
GOODALL  
v.  
CLARKE.

May 11. The appeal was heard by MEREDITH, C.J.C.P., in the Weekly Court.

*F. E. Hodgins*, K.C., for the defendant.

*H. Cassels*, K.C., for the plaintiff.

MEREDITH, C.J. (at the conclusion of the argument):—I think the Referee has assessed the damages on too liberal a scale.

The case is peculiar. The property dealt with and the circumstances under which the realisation of the shares took place are exceptional.

Whatever may be doubtful in the case, it is free from doubt that, at the time the appellant sold his shares to those who were representing the La Rose mine, he was not in a position that would lead him, if so minded, to sell except at the best price which<sup>\*</sup> could be obtained. The 20,000 shares in question were but a fraction of his holding; and there is no reason to doubt that, when he sold for \$100,000, he obtained the best price he could get for the shares. There was no market price. The shares were not quoted on the market, and the exceptional transaction with Crawford does not, I think, afford a fair test as to the amount with which the appellant is chargeable, nor does the Millar sale.\* The circumstances there were exceptional; it took place a month afterwards, and they were the last shares to be got in. I think it would be unfair to charge the appellant with more than 26 cents a share, which was the price he got.

At the time he sold his shares he was maintaining, wrongly it has turned out, but probably with the obstinacy which has characterised some of his steps in connection with the litigation regarding the property, that he was the owner of the 20,000 shares.

He does not, perhaps, deserve to escape from the additional sum with which, if the Referee's award had stood, he would have been charged. A great deal of his trouble has been brought about by the devious methods which he adopted in carrying on his transactions.

\* The Referee in his written reasons for his report said: "Thomas Crawford . . . received 40 cents a share for his block of 445,312 odd shares, while the McLeod estate accepted for their interest the sum of \$60,000, which was equal to about 19 cents a share. The only dealing at arms' length in connection with the shares appears to be with the shares held by Millar and Bedell, and they obtained, as a result of holding out for their 371,094 shares, \$150,000, or a little better than 40 cents a share; while Clarke claims to have received for his block the sum of \$100,000, equal to about 26 cents a share."



The report will be varied by reducing the amount of the damages to 26 cents per share.

There will be no costs to either party.

The plaintiff appealed from the order of MEREDITH, C.J.

Meredith, C.J.

1910

GOODALL  
v.  
CLARKE.

June 10. The appeal was heard by a Divisional Court composed of CLUTE, SUTHERLAND, and MIDDLETON, JJ.

*R. S. Cassels*, for the plaintiff. The question is as to the measure of the plaintiff's damages in respect of the 20,000 shares of stock to which he has been found entitled, and which the defendant disposed of on the 17th March, 1909. The Referee to whom the matter was referred under the judgment of Riddell, J., has fixed the damages at 40 cents a share, which has been reduced, by the order appealed from, to 26 cents a share. The stock was practically owned at that time by the defendant, and three other persons, two of whom, Millar and Crawford, had disposed of their interests at 40 cents a share, while the third, Miss McLeod, who sold at 19 cents a share, made no inquiry, as she was merely a legatee, and anything she got was "found money," so far as she was concerned. The learned Chief Justice thought the sales at 40 cents should be disregarded, and that, when the defendant sold at 26 cents, he tried to get the best price possible. It is submitted that the plaintiff is entitled to charge the highest price obtained for the shares between the date of conversion and the trial: *Michael v. Hart*, [1901] 2 K.B. 867, [1902] 1 K.B. 482. It is true that the Court of Appeal, in the latter judgment, did not pass on the point, as it was unnecessary for them to do so, but reference may be made to the judgment of Wills, J., at the trial, [1901] 2 K.B. at p. 869, where he says that "the defendants are wrong-doers, and every presumption is to be made against them." Reference also to *Mayne on Damages*, 7th ed., pp. 195, 409.

*F. E. Hodgins*, K.C., for the defendant. The stock had no market value, and the plaintiff had committed himself to the settlement which had been made in respect of it. The price obtained for Millar's stock was not a criterion, as it had a special value on account of his being a director, and holding an agreement preventing amalgamation with the La Rose company. There were no exceptional circumstances attending the sale of Miss McLeod's shares,

D. C.  
1910  
GOODALL  
v.  
CLARKE.

which was made in March, 1909, shortly before the defendant disposed of the stock now in question. As to *Michael v. Hart*, I refer to the discussion of that case in Mayne on Damages, 8th ed., pp. 219, 220, and to the statement on p. 221 that the assumption is not to be made in such cases that, if the plaintiff had had the stock under his control, he would have sold at the highest price ever reached by it, as that would be allowing him a "purely speculative profit:" see *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270, at pp. 284-286. The following cases were also referred to: *In re Ottos Kopje Diamond Mines Ltd.*, [1893] 1 Ch. 618; *Williams v. Reynolds* (1865), 6 B. & S. 495; *In re Bahia and San Francisco R.W. Co.* (1868), L.R. 3 Q.B. 584, at p. 595; *Greaves v. Ashlin* (1813), 3 Camp. 426; *Tempest v. Kilner* (1846), 3 C.B. 249; *Ames v. Sutherland* (1906), 11 O.L.R. 417, at p. 420.

*Cassels*, in reply, said that the question was what would be reasonable damages in view of all the circumstances, and referred to 13 Cyc. 169, where the American cases are collected.

July 29. CLUTE, J.:—Appeal from the judgment of Meredith, C.J., varying the report of the Referee and reducing the amount of the damages from 40 cents per share to 26 cents per share.

This action was tried by Riddell, J., and referred to George Kappele, Official Referee, to assess the damages which the plaintiff sustained from breach of contract in the sale of 20,000 shares in the Lawson Mine Limited.

The Referee allowed 40 cents a share as their value at the time of conversion, and assessed the damages by reason of the breach of contract at the sum of \$8,000. The Referee further finds that the defendant paid the plaintiff the sum of \$5,100, leaving a balance of \$2,900, with interest at 5 per cent. from the 17th March, 1909. This payment was made on the basis of \$5,000 for debt and \$100 for interest.

The sole question involved in this appeal is as to the amount of damages the appellant is entitled to recover for the sale of his shares on the 17th March, 1909. On this date the respondent, Clarke, made a sale of 100,000 shares, including the 20,000 of Goodall's, at 26 cents per share. On the 11th March there was a sale by McLeod of like shares at 19 cents a share, and on the 11th April there was a sale by Millar at 40 cents a share.

In the oral judgment delivered by the Chief Justice on appeal from the Referee's report, the learned Chief Justice thought the Referee had assessed the damages on too liberal a scale; that the case was peculiar, and the property dealt with and the circumstances under which the realisation of the shares took place exceptional. He is reported as saying that: "Whatever may be doubtful in the case, it is free from doubt that, at the time the appellant sold his shares to those who were representing the La Rose mine, he was not in a position that would lead him, if so minded, to sell except at the best price which could be obtained. The 20,000 shares in question were but a fraction of his holding; and there is no reason to doubt that, when he sold for \$100,000, he obtained the best price he could get for the shares. There was no market price. The shares were not quoted on the market, and the exceptional transaction with Crawford does not, I think, afford a fair test as to the amount with which the appellant is chargeable, nor does the Millar sale. The circumstances there were exceptional; it took place a month afterwards, and they were the last shares to be got in. I think it would be unfair to charge the appellant with more than the 26 cents a share, which was the price he got."

There is no doubt that the Millar sale was exceptional. All the stock had been got in, except his, which was necessary to complete the consolidation that had been arranged, and probably induced the higher rate for his shares in order to close the transaction. There was no market value for the shares. Goodall had advanced certain sums to Clarke, and held for a short time these shares as security, and afterwards purchased them. From the nature of the transaction and the conduct of the parties throughout, I think it probable that Goodall would not have sold the shares when Clarke sold them; at all events, he was not bound to do so. Clarke should have known, and he did know, that he was selling what did not belong to him, in breach of trust and in breach of contract. As the matter now stands, he has simply paid what money the plaintiff, Goodall, advanced to him, with possibly the interest. His wrongdoing has not cost him a cent. Goodall knew all the conditions that existed; he had the right to be allowed to exercise his judgment and to fix his own time for the sale of the shares which belonged to him.

The appellant's counsel cited *Michael v. Hart*, [1901] 2 K.B. 867,

D. C.  
1910  
GOODALL  
v.  
CLARKE.  
—  
Clute, J.

D. C.  
1910  
GOODALL  
v.  
CLARKE.  
Clute, J.

in appeal [1902] 1 K.B. 482. In that case the plaintiff entered into a contract with the defendants, whereby the defendants were to purchase certain shares on his behalf. The defendants, in pursuance of that contract, purchased shares on the plaintiff's behalf, and the plaintiff was entitled to have them delivered to him on the settling day, on payment of certain prices. The defendants by their contract undertook that they would at any time before the settling day, being directed to do so by the plaintiff, sell the same shares for the plaintiff. This they did not do, but repudiated their contract. Wills, J., under those circumstances, held that the plaintiff was entitled to whatever advantage would have been his, or that might have been his, if the contract had been carried out, and that amongst those advantages was the right to sell the shares whenever he chose during the period over which the transactions were to run. He says, [1901] 2 K.B. at p. 869: "No doubt the plaintiff would in fact never have realised the best price that ruled during that period. But I think I am right in saying that the Courts have never allowed the improbability of the plaintiff's obtaining the highest prices to be taken into consideration for the purpose of reducing the damages. The defendants are wrong-doers, and every presumption is to be made against them. In my opinion the plaintiff is entitled to the highest prices which were obtainable during the period during which he had the option of selling." In appeal this point was not disposed of by the Court of Appeal, a compromise having been arrived at with regard to the mode in which damages were to be computed. It was, however, held that the plaintiff was entitled to insist on the performance of the defendants' contract at the end of the May settlement, and to measure his damages with reference to the prices of the stocks at that date, and that the defendants were wrong in their contention that damages ought to be assessed with reference to the prices of the stocks when the defendants closed the plaintiff's account.

It is said in *Mayne on Damages*, 7th ed., p. 195, that "where there has been a contract to deliver fully paid-up shares, the damages will be the market value of the shares at the time at which they ought to have been delivered."

It seems doubtful whether the extreme view as laid down by Wills, J., is good law. See *Mayne on Damages*, 8th ed., p. 221; *McArthur v. Lord Seaforth* (1810), 2 Taunt. 257; *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270, 284; *Williams v. Peel River Land and Mineral Co.* (1886), 55 L.T.N.S. 689.



It is well recognised, however, in *Michael v. Hart*, that the defendant cannot fix the date by rescission, or the time when the price is to be fixed by wrongfully converting the same at that particular period. Collins, M.R., dealing with this question in appeal, [1902] 1 K.B. at pp. 489, 490, says: "It is argued on behalf of the defendants, in the first place, that the closing of the plaintiff's account by the defendants was a final breach of the defendants' contract with the plaintiff. It is said that, inasmuch as that closing of the account was effected by releasing the jobbers with whom the defendants had carried over the stocks from their contracts, that for some reason or other affected the right of the client in suchwise that he was bound to treat that repudiation of their contract by the defendants as a final breach, and the only breach of which he could take advantage: in other words, it is said that there was a breach of such a nature, having regard to the relation between stockbroker and client, that there was no option on the part of the plaintiff afterwards to insist on the contract, and wait till the date fixed for performance, and then measure his damages with reference to that date, but he was bound to treat the contract as rescinded upon the closing of his account, and measure his damages with reference to the date at which it was so closed. I cannot assent to this argument. The general rule, which is laid down with regard to such cases, is that, where there has been what has been called an anticipatory breach of contract going to the whole consideration, it has not of itself the effect of rescinding the contract, for there must be two parties to a rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; but, on the other hand, he may refuse to treat the contract as rescinded, and hold the party repudiating the contract to his obligation when the time fixed for performance arrives. That appears to me to be in substance the law on the subject as laid down by Cockburn, C.J., in the case of *Frost v. Knight* (1872), L.R. 7 Ex. 111." See also *Johnstone v. Milling* (1886), 16 Q.B.D. 460.

The writ was issued in this case on the 27th March. The plaintiff claims a declaration that he is entitled to receive from the defendant the 20,000 shares. The shares having been disposed of, specific performance for the delivery of the shares could not be or-

D. C.  
1910  
GOODALL  
v.  
CLARKE.  
Clute, J.

D. C.  
1910  
GOODALL  
v.  
CLARKE.  
Clute, J.

dered, and a reference was made as to the damages. It seems, therefore, to me clear that Goodall has never recognised the act of the defendant, but has pursued his remedy to have a return of the shares. It is not a case of his consent that he now takes damages, but because he can obtain no other remedy. The shares on the day the action was brought had no market value. In such case the damages to be allowed would seem to fall within the case of *In re Bahia and San Francisco R.W. Co.*, L.R. 3 Q.B. 584, where Lord Chief Justice Cockburn says: "The measure of damages would be the market price of the shares at that time; if no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares."

While I agree with the learned Chief Justice that the Millar sale was exceptional, and that the Referee was wrong in fixing 40 cents a share as the value of the shares to which the plaintiff was entitled, yet I think a jury assessing damages ought to take into consideration the fact of the subsequent sale at that price, not as the measure of damages, but as one of the elements to be considered. And dealing with the question as a jury probably would, a fair assessment of damages over and above the \$5,200 would be \$1,500.

The appeal should be allowed and the judgment below varied accordingly, with costs throughout.

SUTHERLAND, J.:—I agree.

MIDDLETON, J.:—I find myself unable to agree with either the view of the learned Chief Justice or the view of the Referee.

I do not think the defendant can escape liability beyond the amount received by him in a case of this kind, merely because he acted in good faith so far as the sale is concerned. Nor do I think he should be held to account for the full price realised by another stockbroker under exceptional circumstances.

The only facts that either party can ascertain with the view of throwing any light upon the value of this speculative stock leave the matter in much doubt.

The effect of this is to place the Court in the position in which a jury must often find itself, and as a jury, in my view, the damages may fairly be assessed at \$1,500 over the \$5,200 realised by the defendant upon the sale.

I would vary the report accordingly, and give the plaintiff costs throughout.

## [DIVISIONAL COURT.]

WILSON v. HICKS.

1910

*Life Insurance—Assignment of Policy to Stranger—Gift—Delivery—Intention—Evidence—Revocation—R.S.O. 1897, ch. 203, sec. 151—Construction of Assignment—Designation of Beneficiary.*

Feb. 2.

D. C.

1910

Aug. 2.

The plaintiff, in December 1896, signed a document (not under seal) by which he purported to assign to the defendant a certain twenty-year endowment policy of insurance on his life, effected in 1888, by which the insurance company promised, in consideration of an annual premium of \$256.50, to pay at the death of the plaintiff, or at the maturity of the policy in 1908, the sum of \$5,000. The assignment stated that "for one dollar" and "for other valuable considerations," the plaintiff assigned, transferred, and set over to the defendant (naming her and describing her as "*fiancée*") all his right, title, and interest in the policy (describing it), "and, for the consideration above expressed, I do also, for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators, and assigns, and their title to the said policy will forever warrant and defend." There was in fact no consideration for the assignment. The plaintiff did not, at the time he executed it, inform the defendant of it; but in February, 1897, he mentioned it in a letter to her; and in March he sent the assignment to the insurance company, and they registered it in their books, and notified the defendant of it. In April the plaintiff wrote to the defendant saying that he enclosed her the assignment, and telling her not to lose it, but he did not in fact enclose it, and she never had the policy or the assignment in her possession. The plaintiff paid the premiums and kept the policy on foot. In January, 1909, he executed a document purporting to revoke the assignment, and brought this action for a declaration that the assignment was duly revoked and that he was entitled to the insurance moneys, the policy having matured:—

*Held*, that, even if evidence of the plaintiff's intention was admissible (and, *semble*, it was not), there was nothing in the evidence to warrant a finding that it was not the intention of the plaintiff to give the policy absolutely and irrevocably to the defendant, nor that it was his intention to make the policy payable to her at his death, should that occur before maturity of the policy, and subject to any change he might desire to make before death or maturity. When the assignment was transmitted to the insurance company and the defendant notified of the transfer of the policy to her, she was, to all intents and purposes, owner of the policy. Delivery was not necessary, but, if it were, there was a constructive delivery by the formal acts of registration with the insurance company and notice to the defendant.

*Held*, also, that the assignment did not operate merely as a designation of a beneficiary, under the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 151, which the plaintiff would have a right to change, but was an absolute, irrevocable assignment outside of the statute.

Judgment of BRITTON, J., reversed.

ACTION for a declaration that the plaintiff was entitled as against the defendant to the moneys payable under a certain endowment policy of insurance, and that an assignment of the policy to the defendant had been effectually revoked.

June 24, 1909, and January 19, 1910. The action was tried before BRITTON, J., without a jury, at Goderich and Toronto.

Britton, J.

1910

WILSON

v.

HICKS.

*W. E. Middleton, K.C., and J. M. Best, for the plaintiff.**W. Proudfoot, K.C., and F. Holmsted, for the defendant.*

February 2. BRITTON, J.:—The plaintiff, on the 26th December, 1888, being then thirty-six years of age, and married, obtained from the Mutual Life Insurance Company of New York an endowment or “twenty-year distribution policy” for the sum of \$5,000, “with the policy’s distributive share of surplus apportioned at the expiration of twenty years from date of policy.” If the plaintiff had died before the expiration of twenty years from the date of the policy, the executors, administrators, or assigns of the plaintiff would have been entitled to the sum of \$5,000. The annual premium was \$256.50, payable on the 26th day of December in each year.

In 1896 the plaintiff was living apart from his wife, and was on friendly terms with the defendant. On the 22nd day of December of that year the plaintiff signed what purports to be as assignment to the defendant, describing her as “*fiancée*,” of all his right, title, and interest in this policy No. 344517, issued by the Mutual Life Insurance Company of New York, and this assignment states that the assignor guarantees “the validity and sufficiency of the foregoing assignment to the above-named assignee, her executors . . . and their title to the said policy will forever warrant and defend.” Neither the policy nor the assignment is under seal. The policy was not attached to the assignment, but the number of the policy is correctly stated.

The defendant says that the plaintiff, before the assignment was executed, spoke of making an assignment to her upon certain conditions. For obvious reasons, I need not refer further to that. The defendant does not now put forward anything as to the then past or future relations, as consideration for the assignment. Such consideration could not be supported, as it would be against public policy. I do not think any point can be made against the defendant by reason of the use of the word “*fiancée*” in the assignment. It must be taken that there was no consideration for the assignment. If it holds as such, it must be as a gift *inter vivos*.

The plaintiff denies that he ever had any intention to make a gift of the entire policy to the defendant, as now claimed. He



wished, at the time the assignment was made, to have the money secured by policy, in case of his death and in case he did not change the destination of it, paid to the defendant. The plaintiff says he at all times supposed he had the right to make the policy payable to another; that he said to the company that he was going to make the money payable to Mrs. Hicks in the event of his death before the maturity of the policy; that he told the agent that he, the plaintiff, wished to make her, the defendant, beneficiary. The form of assignment was sent, and the plaintiff signed the form so sent. The plaintiff is a business man, understands the meaning of such language as is used, and voluntarily signed the paper, a copy of which was admitted and put in on the trial. No letter from the plaintiff to the company, if there was any letter, was produced.

The defendant can know nothing about the plaintiff's intention, but she strongly alleges that his promises were to give the policy to her.

I will refer again to the plaintiff's intention when dealing with his letter to the defendant of the 5th April, 1897.

The assignment was executed on the 22nd December, 1896, and was held by the plaintiff until sent by him to the agent of the company at Toronto; which was probably about the 24th March, as the home office, on the 26th March, 1897, made a memorandum of notice of the assignment.

On the 23rd February, 1897, the plaintiff wrote to the defendant, stating, in reply to her question of why the plaintiff wanted her to go to Toronto, "I would like to have you there when I leave the life assurance assignment with the agent."

After that, and probably on or about the 24th March, the plaintiff did leave with, or send to, the Toronto agent, the assignment. Then the defendant, in due course, received from the Toronto agent a letter dated the 28th March, 1897, addressed to her at Seaforth: "We have received from our home office the following: 'Notice of assignment of policy No. 344517 to Mrs. Emma Hicks has been received, but this company assumes no responsibility as to its validity. New York, March 26th, 1897.' Yours truly, Thos. Merritt, manager."

After the 28th March, 1897, and apparently on the 5th April, the plaintiff wrote to the defendant in part as follows: "Also

Britton, J.

1910

WILSON

v.

HICKS.

Britton, J.  
1910  
WILSON  
v.  
HICKS.

enclosed find assignment of interest in insurance policy. This is what I wanted to take you to the city for—to have this registered by the Toronto agent who has charge of the Canadian business. If anything should happen to me, this, with what I have in the business, would put . . . free from want. Take good care of this and don't lose it till I come down."

That letter is important both as to the plaintiff's intention in regard to delivery of assignment and as to what such delivery would mean. This letter would indicate that it was not intended by the plaintiff to deliver absolutely, and as an irrevocable act, this assignment; but rather to shew to the defendant that it had been executed, and that he would get the instrument itself when he visited the defendant. This, however, is only important as something from which may now be gathered the plaintiff's intention at the time the document was executed. As to the delivery of the assignment, the defendant is clear that no assignment was enclosed. She never saw any assignment, and none was ever handed to her or received by her.

Then the point is now reached that there was not, to complete this alleged gift, any delivery in fact of policy or assignment.

Was there a constructive or symbolical delivery of the assignment to the defendant? And, if so, was that sufficient to complete and perfect the gift of this policy?

The untrue statement in the plaintiff's letter, that the assignment was enclosed, cannot amount to delivery, and certainly not to delivery to perfect a gift.

The letter is at least ambiguous as to the object of enclosing it; it is as consistent with its being sent so that the defendant could read and return it, as that she should keep it.

Then, delivery to the insurance company was not stated to be a delivery for the defendant. She had not asked to have it sent to the company; she had not asked the company to accept it for her; nor did she reply to the letter received from the company. She in no way expressed herself as satisfied with what the company did. If at this time she thought it something, in any event, for her benefit, or supposed benefit, she did not say so. Her silence cannot be said to amount to a ratification.

I do not find any helpful authority in our own Courts upon this point.

An American case of *Weaver v. Weaver* (1899), 182 Ill. 287, decides that "the delivery of a duplicate assignment of a life assurance policy to an agent of the company does not amount to a delivery to a third person for benefit of the assignee, when the copy was furnished the agent in compliance with a condition in the policy."

The following condition is indorsed upon this policy: "The company declines to notice any assignment of this policy until the original, or a duplicate, or a certified copy shall be filed in the company's home office. . . . The company will not assume any responsibility for the validity of an assignment."

In *Trough's Estate* (1874), 75 Pa. St. 114, it was decided that an assignment executed and placed in an envelope addressed to the assignee, with directions to deliver on death of assignor, and which was so delivered, was invalid. It was held in that case that where donor retains control of bond or chose in action given or assigned, he may cancel or destroy it.

It is important in this case that the plaintiff always retained control of the policy. The thing, the subject of the alleged gift, was never handed over. The defendant had not such control of it as would have entitled her to demand the surrender value of it from the company, if it had any surrender value. She was not in a position to surrender it by handing it over.

The policy being the thing given, there ought, in addition to the assignment evidencing the gift, to be an actual handing over of the thing itself or something equivalent to it, or some reason to the contrary to comply with the rule of law, "To perfect a gift, the delivery must be, so far as the thing is capable of it, an actual delivery."

My conclusions are:—

(1) That there was no intention on the part of the plaintiff to give absolutely and irrevocably to the defendant the policy in question. It was his intention to make the policy payable to her at his death, should that occur before maturity of the policy, and subject to any change he might desire to make before such death or maturity.

Britton, J.

1910

WILSON

v.

HICKS.

Britton, J.

1910

WILSON

v.

HICKS.

(2) The transaction was not such that the plaintiff transmitted the title to this policy, and the money it represents, to the defendant as donee.

(3) That there was no delivery, constructive or otherwise, of the assignment of the policy to the defendant.

I am aided in arriving at my conclusions, and confirmed in them, by these facts and circumstances.

The defendant never asked for, or insisted upon having, the policy. After the relations between her and the plaintiff ceased to be friendly, she made no claim.

The policy was good only from year to year, conditional upon the yearly premiums being paid. The defendant paid none of these, and, so far as appears, made no inquiries as to them. The plaintiff continued to pay until the end, just as he had done before the assignment, and before friendly relations ceased.

When the assignment was executed the policy had been in force only eight years. It probably had some surrender value; and, assuming it to have been a gift, the defendant would naturally have asked for such surrender value, if any, at the time of breaking off with the plaintiff, and she would, I think, have then insisted upon getting the policy, and having her right determined under the assignment. She would have manifested some anxiety, or interest, or concern as to future premiums. It would have been a great burden, if not one impossible for her to carry, to pay these premiums.

On the other hand, the plaintiff must all along have taken the position he took at the trial, for he continued to pay without question his premiums to the end.

Had I been able to find in accordance with the defendant's contention, possibly the plaintiff would have been entitled to relief by way of salvage as to premiums paid since the 22nd December, 1896, because, had they not been paid, and had the policy not been surrendered, it would have been only worthless paper.

My decision has been quite irrespective of the Insurance Act.

Apart from the form of the assignment in question, the plaintiff relies upon the Insurance Act, R.S.O. 1897, ch. 203, sec. 151, sub-secs. 3, 4, 5, as amended by 1 Edw. VII. ch. 21, sec. 2, sub-secs. 5, 6, and 7.

The assignment lodged with the company did designate the



defendant as a beneficiary. She was not of the preferred class, and not a beneficiary for value; so the plaintiff had the right to change, as he has done.

The assignment executed the 22nd December, 1896, was prior to the passing of sec. 159 of the Insurance Act, but if "declaration" means or includes "declaration" designating a beneficiary, as I think it does, then sub-sec. 4 of sec. 151, ch. 203, R.S.O., makes it applicable to any contract of insurance or declaration made before the passing of the Act.

The judgment will be for a declaration that the plaintiff, subject to payment of the defendant's costs, is entitled to be paid the money due and payable under the policy in question, and that the paper called the assignment has been effectually revoked.

Owing to the special facts and circumstances of this case, it is not one for costs to the plaintiff, but is one where the costs of the defendant should be paid out of the money in Court. The residue of the money will be paid out to the plaintiff.

The defendant appealed from the judgment of BRITTON, J.

June 9. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., CLUTE and SUTHERLAND, JJ.

*W. Proudfoot*, K.C., for the defendant. The assignment of the policy to the defendant was complete, although for convenience the policy and one duplicate part of the assignment were kept in the plaintiff's vault, the other duplicate having been sent to the insurance company, who duly notified the defendant. Actual delivery of the assignment to the defendant was unnecessary, in view of these circumstances, and, even if necessary, it is submitted that the plaintiff held the documents as agent for the defendant. Objection was taken at the trial to the reception of the evidence there given, tending to qualify the written document, and to shew, as held by the learned trial Judge, that there was no irrevocable intention on the part of the plaintiff to assign the policy. The trial Judge further finds that the assignment did not transfer the title to the policy and the money secured by it, and that there was no delivery, constructive or otherwise, of the assignment to the defendant. In opposition to these findings I refer to *Sherratt v. Merchants Bank of Canada* (1894), 21 A.R. 473,

Britton, J.

1910

WILSON  
v.  
HICKS.

D. C.  
1910  
WILSON  
v.  
HICKS.

where it is laid down that "a gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it." See also the cases referred to in the argument and judgments in that case, especially *Standing v. Bowring* (1885), 31 Ch.D. 282, per Cotton, L.J., at p. 288. Reference was also made to the following cases: *Siggers v. Evans* (1855), 5 E. & B. 367; *London and County Banking Co. v. London and River Plate Bank* (1888), 21 Q.B.D. 535, at p. 542; *Re Richardson, Weston v. Richardson* (1882), 47 L.T.N.S. 514; *Toker v. Toker* (1862), 31 Beav. 629; *Mackintosh v. Stuart* (1864), 36 Beav. 21; *Winter v. Winter* (1861), 4 L.T.N.S. 639. It is also contended on behalf of the plaintiff that, even granting that the assignment was a valid one and duly delivered, he was entitled to revoke it, and change the beneficiary under the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 151, sub-secs. 3 and 4, as amended by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 5, but sec. 151 did not come into force till the 13th April, 1897, and cannot interfere with a valid gift, completed before that date; nor is the plaintiff assisted by the retroactive application of sub-sec. 4, which relates only to a "declaration heretofore made," and not to an assignment. To have the effect contended for by the plaintiff, the legislation must be express: see Am. & Eng. Encyc. of Law, 2nd ed., vol. 14, pp. 1014, 1020, 1022 (note 2).

*J. M. Best*, for the plaintiff. It was unnecessary to revoke the assignment to the defendant, as the title of the plaintiff was complete without that formality, but it was done for extra assurance in case the assignment to the plaintiff's niece should be successfully impugned. It is submitted that the assignment to the defendant was a "declaration" under sub-sec. 4 of sec. 151 of the Insurance Act, and could, therefore, be revoked under sub-sec. 3. The evidence shewed that the plaintiff's intention was that the defendant should only receive the insurance money in certain events, which had not occurred. There was no consideration for the assignment, so the insurance money could only be a gift, which was incomplete and therefore invalid: *Cochrane v. Moore* (1890), 25 Q.B.D. 57; *Travis v. Travis* (1886), 12 A.R. 438; *Brown v. Davy* (1889), 18 O.R. 559; *Ward v. Bradley* (1901), 1 O.L.R. 118. The *Sherratt* case relied on by the defendant is quite different from that at bar. There the transaction was

between husband and wife, and the deposit receipt, which was the subject of the gift, was actually delivered by the husband to the wife: see judgment of Osler, J.A., at p. 478 of 21 A.R., and of MacLennan, J.A., at p. 483, on this point. The following cases were also referred to: *Book v. Book* (1900), 32 O.R. 206, *per* Meredith, J., whose judgment was reversed but on a different ground (1901), 1 O.L.R. 86; *Fisher v. Fisher* (1898), 25 A.R. 108; *Spiers v. Hunt*, [1908] 1 K.B. 720; *Wilson v. Carnley*, [1908] 1 K.B. 729. The plaintiff is entitled to judgment under the findings of fact by the trial Judge, unless they are manifestly wrong, which cannot be said to be the case here.

*Proudfoot*, in reply. The defendant does not base her claim on any marriage consideration; so the cases cited on that head (*Spiers v. Hunt* and *Wilson v. Carnley*) need not be considered. As to the application of the *Book* case, the defendant is willing to allow to the plaintiff the premiums paid by him subsequently to the assignment. The following additional cases on the question as to delivery were cited: *Mews v. Mews* (1852), 15 Beav. 529; *O'Brien v. O'Brien* (1882), 4 O.R. 450; also, as to completion of a gift by intention coupled with delivery, *Picksley v. Starr* (1896), 149 N.Y. 432. The plaintiff is a business man, and should not be heard to say that the document signed by him did not contain his meaning.

August 2. CLUTE, J.:—On the 26th December, 1888, the plaintiff effected an endowment insurance for \$5,000, the annual premium upon which was \$256.50. On the 22nd December, 1896, upon a form furnished at his request, the plaintiff executed an assignment of the said policy to the defendant, Emma Hicks, in the following words:—

“For one dollar, to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer, and set over to Mrs. Emma Hicks, *fiancée*, of Seaforth, Ont., all my right, title, and interest in this policy No. 344517, issued by the Mutual Life Insurance Company of New York, and, for the consideration above expressed, I do also, for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators, and assigns, and their title to the said policy will forever warrant and defend.

D. C.  
1910  
WILSON  
v.  
HICKS.

D. C.

1910

WILSON

v.

HICKS.

Clute, J.

"Dated in Seaforth, this 22nd day of Dec., 1896.

"In the presence of

(signed) "Wm. O. Reid."

(signed) "Robert Wilson."

At the time of the assignment the plaintiff was living apart from his wife, and was on friendly terms with the defendant. Neither the policy nor the assignment is under seal. The number of the policy, however, is correctly given in the assignment, so that its identity is beyond question. The relation of the parties at this time need not further be considered. There was no consideration for the assignment, and, if valid, it must be as a gift *inter vivos*. The plaintiff did not inform the defendant, at the time, that he had executed the assignment; but, on the 23rd February, 1897, he wrote her saying: "I would like to have you there (in Toronto) when I leave the life assurance assignment with the agent." The assignment seems to have been sent to the agent of the company at Toronto about the 24th March, as the home office in New York, on the 26th March, 1897, made a memorandum of the notice of the assignment. The defendant in due course received the following letter: "Toronto, Ont., Mar. 28, '07. Mrs. Emma Hicks, Seaforth, Ontario. Dear Lady: We have received from our home office the following: 'Notice of assignment of policy No. 344517 to Mrs. Emma Hicks has been received, but this company assumes no responsibility as to its validity. New York, March 26th, 1907,' Yours truly, Thomas Merritt, manager."

On or about the 5th April the plaintiff wrote to the defendant in part as follows: "Also enclosed find assignment of interest in insurance policy. This is what I wanted to take you to the city for—to have this registered by the Toronto agent who has charge of the Canadian business. If anything should happen to me, this, with what I have in the business, would put my darling free from want. Take good care of this and don't lose it till I come down."

The defendant says the assignment was not enclosed, and she never saw or received it. She states, however, that the plaintiff informed her that he kept the policy and the assignment in an old cash-box in the vault in the store, and that, if anything should happen to him, she would know where to find it. She denies that he ever told her he would transfer the policy to any one else, or that she said he could do as he liked about it.



In January, 1909, she was asked by the plaintiff, through one Hill, to re-assign the policy, which she refused to do. On the 23rd January, 1909, the plaintiff executed an instrument under seal in part as follows: "I do hereby revoke the assignment or declaration and direction made by me in favour of Emma Hicks, of the said town of Seaforth, and dated the 22nd of December, 1896, a true copy of which assignment is hereunto annexed, marked A, and same is hereby declared to be null and void, and I do hereby declare, authorize, and direct all moneys due and payable under the said policy No. 344517 in the Mutual Life Insurance Company of New York, described in said assignment or declaration hereunto annexed, to be paid to me or to my estate."

The instrument was duly executed by the plaintiff.

There was some evidence and much discussion as to what the intention of the plaintiff was in executing this assignment. Certainly his intention—if otherwise than implied in the instrument itself—was not communicated to the defendant; nor do I think that evidence of such intention upon his part was admissible. But, even if it were admissible, I am unable, from the evidence, to reach the conclusion arrived at by the learned trial Judge. The assignment is absolute upon its face. The fact that the plaintiff paid the premiums from time to time evidences, to my mind, his intention to make the gift a valuable one by keeping the policy alive, and each payment was a re-affirmation of the gift already made. I can find nothing in the evidence to warrant the finding of the trial Judge that there was no intention on the part of the plaintiff to give absolutely and irrevocably to the defendant the policy in question; nor that it was his intention to make the policy payable to her at his death, should that occur before maturity of the policy, and subject to any change he might desire to make before such death or maturity. The assignment was transmitted to the agent, and by him forwarded to the home office, and the defendant duly notified of the transfer of the policy to her. She was then, in my opinion, to all intents and purposes, owner of the policy. Delivery was not necessary, but, even if a delivery was necessary, I think there was a constructive delivery of the policy by the formal acts of registration in the home office and the notification to her.

In *Standing v. Bowring*, 31 Ch. D. 282, Lord Justice Cotton

D. C.  
1910  
WILSON  
v.  
HICKS.  
Clute, J.

D. C.  
1910  
WILSON  
v.  
HICKS.  
Clute, J.

says, at p. 288: "I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it.' " There the transfer was of stock into the joint names of the transferor and the donee, and it was held that the former could not revoke the gift, although the donee had no notice of it until he was requested to join in a re-transfer to the donor.

This case is approved in *London and County Banking Co. v. London and River Plate Bank*, 21 Q.B.D. 535. Lindley, L.J., says, at p. 541: "It was settled as long ago as the time of Lord Coke that the acceptance of a gift by a donee is to be presumed until his dissent is signified, even though the donee is not aware of the gift (*Butler and Baker's Case* (1591), 3 Rep. 25a), and this doctrine has been applied even as against the Crown, and so as to defeat a title accruing to it before actual assent: *Smith v. Wheeler* (1672), 1 Vent. 128, referred to at length in *Small v. Marwood* (1829), 9 B. & C. 300, at p. 306, and in *Siggers v. Evans*, 5 E. & B. 367, at p. 382. In the last-mentioned case the presumption was held to apply to a gift of an onerous nature; and in *Standing v. Bowring*, 31 Ch. D. 282, the presumption was also held to apply to a gift which the donor desired to revoke before the donee knew that it had been made. The presumption of acceptance in such cases is artificial, but is founded on human nature; a man may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of assenting were given him." See also *Re Blake, Blake v. Power* (1889), 60 L.T.N.S. 663, and *In re Arbib and Class's Contract*, [1891] 1 Ch. 601, at p. 613.

In *Re Richardson, Weston v. Richardson*, 47 L.T.N.S. 514, a policy of insurance on a man's life was taken out by him in the name of his daughter. He retained it in his own hands, paid the premiums, and made no disposition of it by his will. It was held that the retention of the policy did not shew that the beneficial interest was not intended to pass, and that the right of the daughter was complete. In this case, objection was made on behalf of the executor that the estate was entitled to the moneys payable under the policy, because the gift was incomplete, the policy not having been handed over to her by her father. Kay, J., said that the legal right to

call upon the office to pay the sum assured was clearly in the daughter, and not in the executor, the contract of the insurance company having been to pay her. The only thing that could be relied on to rebut this presumption of advancement was the fact that the father kept the policy in his own hands. But that was not sufficient: *Fortescue v. Barnett* (1834), 3 My. & K. 36; *Sewell v. King* (1879), 14 Ch. D. 179. The mere retention of the policy did not shew that the beneficial interest also was not intended to pass to her. Thus the gift of the policy to the daughter was a complete one, for both the legal interest and the beneficial were vested in her. And accordingly she was entitled to receive the sum assured.

In *Sherratt v. Merchants Bank of Canada*, 21 A.R. 473, it was held that a gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it.

I think the gift was complete. The assignment and the registration thereof with the company and notice by the company to the defendant that the assignment was so registered were sufficient, without more, to entitle the defendant to receive the money. Nor do I think effect can be given to the alleged intention of the donor to reserve the right of revocation. If such a contention can be admitted here, there is no case in which it might not avail where a gift had been made. It utterly contradicts the form of the gift, and oral evidence of such intention is not, in my opinion, admissible.

It is urged, however, that the effect of the statute R.S.O. 1897, ch. 203, sec. 151, sub-secs. 3 and 4, as amended by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 5, gives the donor the right to change the beneficiary, and that the legal effect of the assignment was merely to designate the defendant as the beneficiary. Sub-section 3 of sec. 151 provides that the assured may designate or ascertain the beneficiary by the contract of insurance or by instrument in writing attached to or indorsed on or identifying the said contract by number or otherwise . . . or by like instrument from time to time . . . alter or revoke the benefits or trusts or add or substitute new beneficiaries or trustees, or divert the insurance moneys wholly or in part to himself or his estate; provided that the assured shall not alter or revoke or divert the bene-

D. C.  
1910  
WILSON  
v.  
HICKS.  
Clute, J.

D. C.  
1910  
WILSON  
v.  
HICKS.  
Clute, J.

fit of any person who is a beneficiary for value, or of the class of preferred beneficiaries to a person not of the class or to the assured himself or to his estate. The amendment reads: "But a beneficiary shall only be deemed a beneficiary for value when he is expressly stated to be so in the policy."

Sub-section 4 declares that this section shall apply not only to any future contract of insurance, and to any declaration made on or relating to any such contract, but also to any contract of insurance heretofore issued and declaration heretofore made.

Sub-section 5 provides that nothing in this Act shall be held or construed to restrict or interfere with the right of any person to effect or assign a policy for the benefit of any one or more beneficiaries in any other mode allowed by law.

The question is, does the assignment here amount to a mere designation of benefit under the statute, or has it the effect of an absolute, irrevocable assignment outside of the statute?

The policy is in form a promise to pay the assured Robert Wilson, or his assigns, the sum of \$5,000, due on the 26th December, 1908, or, if the assured should die before that time, then to make payment to his executors, administrators, or assigns.

It does not appear to me that under sub-sec. 3 an absolute assignment of the policy is contemplated. Under that section the policy remains the property of the assured with the right to designate a beneficiary and to alter or revoke the benefits thus conferred upon the beneficiary. The word "assignment" is nowhere used in that sub-section, nor was it intended to apply, in my opinion, to an assignment. Sub-section 5 makes this clear. Nothing contained in the Act is to restrict or interfere with the right of any person to assign a policy in any other mode allowed by law. Under the above assignment to the defendant, the plaintiff assigned and transferred all his right, title, and interest in the policy. He did not merely designate the beneficiary, but transferred to her the absolute legal title.

With great respect, the judgment below should be set aside and judgment entered for the defendant, with a declaration that the defendant is entitled to be paid the money due and payable under the policy in question. The defendant is entitled to the costs below and of this appeal. In case there is no appeal, the plaintiff may be paid the amount of the premiums paid by him



subsequent to the assignment, in pursuance of the offer made by the defendant's counsel, less the costs of the action and appeal.

SUTHERLAND, J.:—I agree.

FALCONBRIDGE, C.J.:—I agree in the result.

If anything turned on the relative credibility of the plaintiff and defendant, she is much more to be believed than he is.

On pages 21, 22, 24, 25, 26, 27, and 28 of the evidence are examples of the device so frequently adopted by the dishonest and shiftless witness, who, confronted with his own writing, will not swear that it is his writing nor yet that it is not. That is, he is not honest or truthful enough to admit it, and he is afraid of a prosecution for perjury if he denies it.

---

[IN THE COURT OF APPEAL.]

SPRAGUE V. BOOTH.

*Contract—Sale of Interests in Railway Systems—Time Deemed to be of Essence—Failure of Purchaser to Make Payment on Day Appointed—Vendor not in Default—Notice Repudiating Contract—Damages for Breach—Deposit—Retention by Vendor—Forfeiture—Relief against—Delay in Bringing Action.*

The plaintiff's claim was for damages for breach by the defendant of an agreement made on the 22nd January, 1902, between M. and the defendant, and for repayment by the defendant of a sum of \$250,000. The plaintiff, by his statement of claim, after setting out the instruments constituting the contract, which shewed that it was to be fully performed on both sides on or before the 1st June, 1902, alleged that the defendant carried out no part of his obligations under it, but made default in the same; and on the 3rd June, 1902, by letter addressed to M. and one W., the defendant formally repudiated the contract; and that all the rights of M. and W. had been duly assigned to the plaintiff, of which express notice in writing had been given to the defendant. The action was commenced on the 26th February, 1907. By an instrument dated the 28th April, 1902, M. assigned all his interest in the contract to W., who, by an instrument dated the 10th January, 1907, after first declaring therein that he wholly abandoned any right, title, and interest which he had in the contract, purported to relinquish, assign, and transfer all his rights to the plaintiff. The contract was with reference to the acquisition by M. and W. of the defendant's interests in two Canadian railway systems, M. and W. paying therefor \$10,000,000. These interests were largely in the shape of shares in the capital stock and bonds of the railway companies. Although the notice of the 3rd June, 1902, was received by M. and W., and the plaintiff was aware of it, there was no protest from any of them, nor any expression of readiness, willingness, or anxiety to perform the contract on

D. C.

1910

WILSON

v.

HICKS.

Falconbridge,  
C.J.

C. A.

1908

Jan. 14.  
Nov. 10.

C. A.  
1908  
SPRAGUE  
v.  
BOOTH.

their part, nor any steps indicating an intention or desire to have it performed, so far as the defendant was aware, until the commencement of the action. The sum of \$250,000 was paid by M. and W. to the defendant as security for the due carrying out of the agreement, and it was agreed that in the event of any default being made in the payment of the money under the terms of the agreement, on the 1st June, 1902, or sooner, the \$250,000 should be forfeited and remain the defendant's absolute property as liquidated damages for such default:—

*Held*, upon the evidence, that M. and those interested with him in the contract were responsible for the failure to complete on the day named in the contract, and the plaintiff was not entitled to damages, and the defendant was entitled to retain the \$250,000.

Judgment of MABEE, J., affirmed.

*Per* MOSS, C.J.O., that the case was one in which, even in equity, time would be deemed to be of the essence, and the circumstances shewed that the parties so regarded it. On the 3rd June, 1902, when the defendant gave the notice, the contract was at an end, and the notice could give no right of action; the plaintiff could not maintain that the defendant, while the contract was on foot, repudiated it so as to give the plaintiff the right to treat it as at an end and sue for damages. Supposing the plaintiff entitled to recover if he could prove his readiness and willingness to complete within a reasonable time after the stipulated day, he had wholly failed to prove his readiness and willingness. No action for damages could be maintained, because there was no actionable breach by the defendant. And, if the plaintiff had sought specific performance or in the alternative damages, and failed, as he must have failed, as to specific performance, he would also fail as to damages. The conditions of the agreement as to the \$250,000 were substantially the same as the law attaches to a deposit made on a contract of sale and purchase; and there was nothing in this case to take it out of the ordinary rule that, if the contract be performed, the money is brought into account as part payment of the purchase-money, but, if the purchaser makes default, it may be retained. That was the contract of the parties; and there was no ground for relief against the forfeiture, if it could be treated as one; the delay alone would be a serious obstacle in the way of that relief.

*Per* MEREDITH, J.A., that there was a substantial failure of the purchaser to carry out the transaction on his part; in the terms of the agreement between the parties, the \$250,000 became the property of the vendor; and there was nothing in law or equity preventing the words which the parties employed being given effect to.

ACTION to recover a deposit of \$250,000 paid by the plaintiff's assignor upon entering into a contract, and \$2,000,000 damages for breach of the contract.

November 11 and 12, 1907. The action was tried before MABEE, J., without a jury, at Ottawa.

Wallace Nesbitt, K.C., and A. M. Stewart, for the plaintiff.

G. F. Shepley, K.C., and J. Christie, K.C., for the defendant.

January 14, 1908. MABEE, J.:—The plaintiff's claim in this action is to recover from the defendant the sum of \$2,250,000 and interest, the amount being arrived at as appears later on.

On the 22nd January, 1902, the defendant entered into a lengthy agreement with Arthur L. Meyer, a banker of New York, which

recites that the defendant controlled substantially the whole issue of the capital stock of the Canada Atlantic Railway Company, and had agreed to sell it to Meyer. The material terms of the agreement may be epitomized as follows:—

Mr. Booth agreed to deliver to Mr. Meyer on the 1st June, 1902, or before if demanded, 50,707 ordinary and 19,776 preference fully paid shares of the railway company. The document then proceeds to state the fact that the railway company contemplated issuing bonds to be secured by mortgage upon the bridge and approaches over the St. Lawrence river for about \$1,000,000, and bonds secured by a mortgage upon the franchises and the property of the company for an additional \$10,000,000, "the said two classes of bonds, when issued, except \$1,608,000 thereof, which shall be deposited with trustees named in the new mortgage for the purpose of redeeming and retiring an equal amount of \$1,608,000 of outstanding bonds now secured on a portion of the road, shall at once upon the issuing of the same be delivered to the said Booth, and thereafter shall, together with the said shares of capital stock, be delivered to the said Meyer, or his assigns, on payment of the consideration hereafter mentioned, and the said Meyer agrees to pay the cost of issuing and engrossing the said issues of bonds." Meyer agreed to pay and Booth agreed to accept "on or before the 1st June, 1902," at the Bank of Montreal, in Ottawa, for the transfer of the stock and bonds, \$10,000,000, less the \$1,608,000 of outstanding bonds.

Meyer agreed to pay to Booth, by way of loan on the 15th March, \$1,000,000, which was to bear interest at 4 per cent., and Booth was to transfer to Meyer, as security for the loan, \$1,000,000 of the new issue of bonds, to be selected by Meyer; then, upon the performance of the agreement, this \$1,000,000 was to be credited upon the purchase-money, "but, on default of payment of the said purchase-price, as provided herein, at the time stated, the said Booth shall have a right to redeem and receive back the said \$1,000,000 of bonds so deposited, upon the payment by him to Meyer of \$750,000 and interest."

The agreement contained many other details for working out the arrangement entered into, which do not bear upon the issues in this action.

This agreement was varied by the letters following:—

C. A.  
1908  
SPRAGUE  
v.  
BOOTH.  
Mabee, J.

C. A.

1908

SPRAGUE

v.

BOOTH.

Mabee, J.

"Ottawa, March 7th, 1902.

"A. L. Meyer, Esq., New York.

"Dear Sir:—Referring to the agreement between you and myself, dated the 22nd January, 1902, I desire to say, without in any way changing the terms and conditions and binding obligations made by that agreement, with reference to the sale of stock by me and the payment of the same by you within the time therein limited, I am willing to forgo the privilege, which, under that agreement, I have, of borrowing from you the sum of \$1,000,000, as in said agreement mentioned, and giving you in security therefor \$1,000,000 of the proposed issue of bonds of the Canada Atlantic Railway Company; and, in lieu thereof, I will accept from you a deposit of \$250,000, paid to me at the Bank of Montreal here, as security for the due carrying out of the terms of the said agreement by you, and in the event of any default being made in the payment of the money under the terms of the said agreement, on the 1st June, 1902, or sooner, then said sum of \$250,000 shall thereupon be forfeited and remain my absolute property as liquidated damages for such default, without any conditions for or any right to repayment or redemption of the same by you. If this is agreeable to you, then, on or before the 11th March instant, please deposit with the Bank of Montreal in New York to my credit said sum of \$250,000, same to be paid by said bank to me at Ottawa, free of charge, on demand; and, upon payment by you of purchase-money, said sum of \$250,000 is to be credited thereon by me. This variation is not to interfere in any particular with the general terms and provisions of said agreement as above mentioned.

"I remain,

"Very truly yours,

"J. R. Booth."

"New York, March 8th, 1902.

"John R. Booth, Esq., Ottawa, Ontario.

"Dear Sir:—In reply to your letter of 7th March instant, I desire to say that I accede to your suggestion therein contained, and I will make the deposit therein referred to, within the time and upon the terms therein set forth.

"I remain,

"Very truly yours,

"A. L. Meyer."



This \$250,000 was deposited as arranged, and was paid to Mr. Booth; and it is to recover that sum, and \$200,000 damages for breach of contract by the defendant, that the action is brought.

This contract was entered into at Ottawa; the plaintiff was present at the time, and was interested with Meyer in it; but the defendant had no knowledge of such interest.

The work of getting matters in proper shape to complete the carrying out of the agreement was left in the hands of the plaintiff, Mr. M. H. Regensburger, a New York attorney, representing Meyer, and Mr. John Christie, of Ottawa, representing the defendant, although as to the latter there were many matters being attended to by him on behalf of Meyer in assisting Mr. Regensburger and the plaintiff. Many letters and telegrams passed between these professional gentlemen, and several interviews took place, all looking towards the completion of the contract. There was much work to be done in the proper preparation of the bonds, the mortgage, meetings of shareholders to be called, resolutions in proper form to be passed, and the like.

On the 17th April, 1902, Meyer assigned the contract to Dr. W. Seward Webb, and on the same day the latter telegraphed to the defendant that the entire agreement had been turned over to him, and that he believed he could carry it through without trouble; this message was confirmed by letter of the same date, in which Dr. Webb requested the defendant to have no more negotiations with Mr. Regensburger or any representative of Meyer, and stated that he (Webb) had arranged for the sale of all the bonds.

On the 18th April Dr. Webb telegraphed to the defendant to have no more bonds signed, as the sheet would have to be reprinted to make space for the guarantee of the Rutland Railway Company. On the 19th April the defendant acknowledged the telegram and letter, and asked for a copy of any document that gave a status to Meyer's assignee, and on the same day Dr. Webb telegraphed to the Secretary of the Canada Atlantic to return any bonds he had.

When the contract passed into the hands of Dr. Webb, Mr. Christie was asked to continue the negotiations with Mr. F. H. Button, counsel for Dr. Webb, and telegrams and letters then commenced to pass between them, and an appointment was made for a meeting in New York, where Mr. Christie went, but Mr. Button did not keep the engagement.

C. A.

1908

SPRAGUE

v.

BOOTH.

Mabee, J.

C. A.  
1908  
SPRAGUE  
v.  
BOOTH.  
Mabee, J.

On the 28th April Meyer formally notified the defendant of the assignment of the contract to Webb, and directed the defendant to deal with him in carrying it out; a copy of such an assignment, dated the 28th April, purporting to confirm an agreement of the 17th April between Meyer and Webb, was furnished to the defendant.

From about the 18th April to the end of May the defendant and Mr. Christie, representing him, were doing everything in their power to get the contract carried out. The president and secretary of the railway company went to New York to sign the bonds and mortgage, but, owing to delay upon the part of Webb and Button, the defendant was unable to obtain completion of the matter, and the secretary was told by Webb, when in New York, to return home, and that he had some new proposition to make to the defendant.

I find the fact to be that there was no delay or obstruction by the defendant or by any one on his behalf; that Mr. Christie was doing all, and more than the defendant was called upon to do, to complete the contract; and this finding extends to the period when negotiations were proceeding direct with Mr. Meyer and his representatives, as well as to the period following the transfer of the contract to Webb; and no default in any particular can be attributed to the defendant.

It is not needful to follow all the transactions that took place between the defendant and his representatives and Dr. Webb and his counsel—nothing came of them. The defendant was put to expense and trouble in trying to get the matter completed; his solicitor, as well as the president and secretary of the railway company, had useless trips to New York; Dr. Webb refused to undertake any personal liability to carry out the contract; Meyer had either failed or his credit had been greatly shaken; and the New York papers were connecting Dr. Webb's name with transactions of Meyer's of a character so distasteful to Dr. Webb that he was overcome with nervous prostration, and had to withdraw from business for a time.

I find the default of Webb, and not of the defendant, was the cause of the non-completion of the contract.

So matters stood at the end of May, when Mr. Regensburger called upon Mr. Christie in Ottawa, and was, in effect, told by Mr. Christie that Meyer could not be recognized, as Webb held the

contract. Regensburger says he then set to work to get from Dr. Webb and Anderson, his counsel, a statement that the contract was in Meyer and not in Webb. He returned to New York on the 27th or 28th May, and on the 29th sent the following telegram to Mr. Christie: "Did I correctly understand you that Monday 2nd June was day for closing under Booth contract? Answer to 886 Park avenue, N.Y.; expense." And on the same day Mr. Christie replied as follows: "I did not undertake any decision as to which day was the proper one for closing under Booth contract." Mr. Christie stated that this telegram came upon him as a surprise, and that he had said nothing to justify it; and I accept his statement.

In New York, Mr. Regensburger received from Mr. Meyer the letter from Mr. Anderson of the 29th May, and then, on the 31st May, returned to Ottawa, and says he shewed it to Mr. Christie; the latter says Mr. Regensburger told him he had such a letter, but that it was not handed to him. The letter is material, and is as follows:—

"New York, May 29th, 1902.

"A. L. Meyer, Esq., 13th Floor, Broad Exchange Bldg.,

"New York City.

"Dear Sir:—On behalf of Dr. W. Seward Webb, I beg to assure you that, should you be able to dispose of it, he claims no rights whatever under the original contract as to the Canada Atlantic Railway Company, made between Mr. Booth and yourself. Mr. Regensburger informs me that an assignment of that contract from yourself to Dr. Webb is in existence and in the hands of Mr. Booth, or a copy of such assignment, and you ask that something in writing be given you which you can exhibit to possible purchasers of this contract. You may shew this letter to any such parties as an evidence that Dr. Webb, in the event stated, abandons all interest which he may have in that contract or under such assignment, and that you may negotiate a contract or arrangement with Mr. Booth in respect to this railroad company in like manner as if the contract between Mr. Booth and yourself or this assignment to Dr. Webb had never been made, or may negotiate a sale of whatever rights are given to you under the original contract, without regard to the assignment to Dr. Webb, all rights under which he will transfer in such event. If you should dispose of this matter, and the parties who take it over desire a more formal paper on Dr. Webb's part,

C. A.

1908

SPRAGUE

v.

BOOTH.

Mabee, J.

C. A.

1908

SPRAGUE

v.

BOOTH.

Mabee, J.

relinquishing his rights under the contract and under the assignment, I will, of course, secure it for you.

"Yours very truly,

"Henry B. Anderson."

It was contended at the trial that this letter was an assignment of the contract back to Meyer. I do not think so. On the other hand, I think the letter bears evidence of careful wording so that it could not operate as an assignment. The letter is based upon Meyer being "able to dispose of it," that is, the contract, and it is only in that event that Webb is abandoning. I think Mr. Christie was quite right in not dealing with Mr. Regensburger, as representing Meyer, with this letter as his only document of title. Nor do I think the telegram from Dr. Webb of the 1st June to the defendant put the matter any higher; the legal title or right to the contract was in Dr. Webb, and the only way it could be got back was by his assigning it to Mr. Meyer. Mr. Regensburger fully understood this, and, as Webb's telegram stated, he (Regensburger) was continually writing Webb to reassign to Meyer. All this was placing the defendant, through no fault of his, in a most awkward position, and I think he was well advised that he was bound to recognize Webb until he executed a proper assignment.

Now, the contract called for payment on the 1st June, and of course it was apparent to Regensburger that the matter could not be completed, at least in the manner provided by the contract, when, on the 31st May, he sent the following telegram to Mr. Christie: "Kindly have Booth your office arrival train tomorrow, have new mortgage executed ready, also \$11,200,000 bonds and auditor's certificate and proof that all indebtedness up to 1st April is paid, excepting outstanding bonds \$1,608,000. Answer my expense to my house address if there is any doubt his ability to close to-morrow."

He knew that the mortgage and bonds had not been completed when his client turned the contract over to Webb, and he, of course, knew that, even had the mortgage and bonds been completed during the negotiations had with Webb, yet they could not be used in carrying out a sale to Meyer; it is then reasonably apparent that the telegram was sent in the endeavour to preserve some right Meyer might be thought to have, or put the defendant in default.



I do not suggest that the course taken was improper under the circumstances. Mr. Regensburger was in duty bound to take all reasonable steps to protect the interests of his client, and it is the result only that I have to deal with. Meyer had not placed Mr. Regensburger in funds to pay the purchase-money, and he would have been unable to complete the purchase, even had the defendant had the bonds and mortgage ready to deliver. Down to the time Meyer assigned the contract to Dr. Webb, the defendant was in no way to blame for the mortgage and bonds not being ready. This arrangement for the issue of bonds secured by mortgage, as provided in the contract, was for the benefit of Meyer, and to enable him to finance for the money to pay for the stock. It was a matter of no concern to the defendant, except, of course, that he was bound to conform to the terms of the agreement.

The position, then, when the time to complete and make payment came, was that the defendant was not in default; Meyer and his assignee, Webb, were both in default; no purchase-money was paid or tendered; and on the 3rd June the defendant notified both Meyer and Webb that the contract was terminated, the \$250,000 deposit forfeited, and that he intended to hold and deal with the stock as he deemed proper.

A point was attempted to be made of a conversation had between the defendant and Mr. Regensburger at the railway station on the 2nd June; but, in my view, it does not affect the position of matters. Mr. Regensburger says the defendant told him he had no desire to forfeit the amount of the contract, and for him (Regensburger) to go to New York and see what he could do about the sale of the road. The defendant says, in effect, that all he told Regensburger was that, if he could satisfy him that the contract could be carried out, he would extend the time for two or three weeks, and would put it in writing. I adopt the defendant's version of this conversation, and my reason for so doing is that, although asked several times what he did in consequence of what Mr. Booth was said to have told him about the sale of the road, he was unable to speak of anything done, and I think, had such permission been given, the cancellation of the contract the following day would have been met by a prompt repudiation, and the attention of the defendant would have been at once drawn to this alleged arrangement. The plaintiff had been interested in the contract from the beginning, and had contributed

C. A.  
1908  
SPRAGUE  
v.  
BOOTH.  
Mabee, J.

C. A.  
1908  
SPRAGUE  
v.  
BOOTH  
Mabee, J.

over \$60,000 of the \$250,000 deposit, and afterwards paid nearly \$80,000 upon account of Meyer's indebtedness, for an assignment from him of his interest in the contract, but all this was without the knowledge of the defendant. The formal transfer of Meyer's interest in the contract was not made to the plaintiff until the 22nd November, 1905, and even at that time the assignment to Webb was still outstanding, and it was not until the 10th January, 1907, that the plaintiff got what purports to be an assignment from Webb, and in the meantime Mr. Booth sold his entire interest in the railway company, but the date of this sale or the amount received by him for the stock covered by the agreement in question does not appear. This action was not instituted until the 26th February, 1907.

The questions, then, for consideration are: what rights can the plaintiff have for the recovery of the \$250,000 deposit paid, or for damages for breach of contract by the defendant?

It was contended for the plaintiff that the defendant had no right to repudiate the contract on the 3rd June, and that all he could do was to give notice that after the lapse of a reasonable time he would treat the contract as at an end. I have read all the cases cited for this proposition. What is there in the nature of this contract that called for any departure from the words of the agreement? The parties contracted to the effect that, if any default was made in the payment of the money on the 1st June, the \$250,000 should become the absolute property of the defendant as liquidated damages. I know of no case that required the defendant to extend the time for payment, and thereby, in effect, make a new contract. I think that time was of the essence of this contract, and that the provision in case of default shews that the parties so intended. Even had there been no provision for default, the nature of the subject-matter of the contract is of such character that the authorities shew the Court should hold that time was of the essence.

Nor am I able to accede to the argument that the defendant did anything that amounted to a waiver. It was said, upon the authority of *Whittier v. McLennan* (1856), 13 U.C.R. 638, that, as the 1st June fell on a Sunday, the time for payment of the purchase-money was on the 31st May, and the negotiations on the 2nd June were a waiver of the time-limit. I do not think so. The defendant and his solicitor did nothing on the 2nd June that could be so regarded.

The cases cited, *Webb v. Hughes* (1870), L.R. 10 Eq. 281, *King v. Wilson* (1843), 6 Beav. 124, and *Cutts v. Thodey* (1842), 13 Sim. 206, upon this point, are not at all like the present, and in all of these cases negotiations continued after the expiry of the time, with a view to completing the contract, and treating it as still subsisting; nothing that took place here can be distorted into anything of that kind.

It was said that the defendant could not on the 3rd June terminate the contract or declare a forfeiture, because he himself was not on that date in a position to complete the contract, or make conveyance of the stock and bonds in accordance with its terms. The cases of *Baker v. Bishop Hill Colony* (1867), 45 Ill. 264, *Mix v. Beach* (1867), 46 Ill. 311, and *Wallace v. McLaughlin* (1870), 57 Ill. 53, cited for this proposition, are all cases where the vendor at the time of the attempt to declare forfeiture had no title to the land, or by reason of outstanding incumbrances could not make title. *Converse v. Blumrich* (1866), 14 Mich. 109, and *Platte Land Co. v. Hubbard* (1899), 12 Col. App. 465, were cases of the same kind. The defendant here had a good title to the subject-matter of the contract. It is true he was not in a position to have the railway company issue the kind of bonds, or the sort of mortgage to secure these bonds, that the contract called for; but this was no fault of his; he had a good title to the stock, and stood ready to make a good conveyance of all he had agreed to sell; and it was solely through Meyer or his representative, or Webb and his advisers, making default in having the form of bonds and mortgage settled, that the defendant was not in a position on the 1st June to do all he had agreed to do; and I do not think it is open to the plaintiff, as assignee of Webb or Meyer, to say that the defendant was not in a position to carry out his contract.

Then, is there any principle upon which the plaintiff has the right to recover the money paid as a deposit? When the contract was varied by the letters of the 7th and 8th March, it was expressly provided that the deposit should be paid as security to the defendant that the contract would be carried out, and that it should be forfeited if Meyer made default.

In *Soper v. Arnold* (1889), 14 App. Cas. 429, the purchaser made default, and it was held he could not recover his deposit; the default made was the inability to pay the balance of the purchase-

C. A.  
1908  
SPRAGUE  
v.  
BOOTH.  
Mabee, J.

C. A.

1908

SPRAGUE

v.

BOOTH.

Mabee, J.

money—that was the same default that both Dr. Webb and Meyer made.

*Howe v. Smith* (1884), 27 Ch.D. 89, is an authority for the position that money paid as a deposit, although the contract does not provide for its forfeiture upon default, cannot be recovered back if default is made; and the same view was taken in *Fraser v. Ryan* (1897), 24 A.R. 441. See also Williams on Vendor and Purchaser, ed. of 1906, p. 951.

It was argued that the Court should relieve against this forfeiture. I do not think so. The contract shews that this sum was agreed upon as liquidated damages, and, for all that appears in the evidence, although the contrary was stated by counsel upon the argument, the defendant may have been damaged by the default of Meyer and Webb to a greater sum than the deposit.

I think also that the action must fail from the fact that the plaintiff's right to recover this deposit can stand no higher than that of Dr. Webb as the assignee of Meyer. I did not think it would be argued that he could have had any right of action; his conduct amounted to an express abandonment of any rights under the contract; and, as he stated to the president and secretary of the railway company, he intended to make some new proposal to the defendant about getting control of the road. It also seems that the plaintiff knew that Dr. Webb intended to make default in payment of the purchase-price. The plaintiff says that Webb told him that he need not be alarmed about the Canada Atlantic; that he (Webb) had made a contract with the defendant by which the defendant would forfeit the Meyer contract, and that thereafter there would be a new contract made between him (Webb) and the defendant by which the road should be taken over, and that the plaintiff should participate in that contract. Mr. Booth says there never was any such arrangement with Webb. I have no reason whatever to doubt the plaintiff's statement that Webb told him he had made such an arrangement.

The default of Webb, therefore, was intentional, and, as I have said, an abandonment of his right under the contract, and he could not have recovered the deposit or damages from the defendant, and I think the plaintiff can have no higher rights, even were the assignment under which he claims from Webb otherwise free from objection. I think the action fails and must be dismissed.



The plaintiff has been placed in a most unfortunate and awkward position, and I would gladly relieve him from the costs of the action if I could upon any proper principle do so. His troubles, however, have arisen by reason of the default of those in whom he had confidence, and not through any improper conduct of the defendant; so, if costs are claimed, the defendant is entitled to them.

The plaintiff appealed directly to the Court of Appeal from the judgment of MABEE, J.

September 21 and 22, 1908. The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

*Wallace Nesbitt*, K.C., and *A. M. Stewart*, for the plaintiff.

*G. F. Shepley*, K.C., and *J. Christie*, K.C., for the defendant.

November 10, 1908. MOSS, C.J.O.:—The plaintiff's claim is for damages for alleged breach by the defendant of a certain agreement made on the 22nd January, 1902, between one A. L. Meyer, of the one part, and the defendant, of the other part, and subsequently modified as to one term, and for repayment by the defendant of a sum of \$250,000. The plaintiff was not a party *eo nomine* to the agreement, but he asserts that at its date he was interested in it, though his interest was undefined and was not disclosed to the defendant. The statement of claim, after setting out the instruments constituting the contract as sued upon, which shew that the contract was to be performed fully on both sides on the 1st day of June, 1902, or before that date, alleges that the defendant carried out no portion of his obligations under it, but made default in the same; and on or about the 3rd June, 1902, by letter addressed to Meyer and one Webb, the defendant formally repudiated the contract; and that all the rights of Meyer and Webb have been duly and absolutely assigned, transferred, and set over to the plaintiff, of which express notice in writing was given to the defendant before the commencement of the action. The action was commenced on the 26th February, 1907. It appears that by an instrument dated the 28th April, 1902, Meyer assigned and transferred all his right, title, and interest in and to the contract to Webb, who, by an instrument dated the 10th January, 1907, after first declaring therein that he wholly abandons any right, title, and interest which he then and

C. A.  
1908  
SPRAGUE  
v.  
BOOTH.  
Mabee, J.

C. A.  
1908  
—  
SPRAGUE  
v.  
BOOTH.  
—  
MOSS, C.J.O.

theretofore ever had in the contract, purports to relinquish, assign, and transfer all his rights to the plaintiff. The instrument contains the following peculiar clause: "This instrument is not to be construed as in any wise a guaranty or warrant by the party of the first part (Webb) that said contract is now existing as a good and valid contract for any purpose, but the effect of this instrument is to be limited to a transfer and assignment to the party of the second part (the plaintiff) of the rights which the party of the first part had or has in and to said contract. The party of the first part, however, disclaims any right to receive amounts or sums of money paid at any time to said Booth under the provisions of said contract."

It also appears that at least \$125,000 of the \$250,000 which the plaintiff in his reasons of appeal (par. 1) states was received by the defendant as a deposit under the contract, was paid by Webb; and further that, although the notice of the 3rd June, 1902, which the plaintiff speaks of as a repudiation of the contract, was received in due course of mail by Meyer and Webb, and the plaintiff was aware of it, there was no protest from any of these persons, nor any expression of readiness, willingness, or anxiety to perform the contract on their part, nor any steps indicating an intention, nor desire to have it performed, so far as the defendant was aware, until the commencement of the action.

This tardiness possibly does not bar the right to bring the action, but the fact that a claim totalling two millions and a quarter of dollars has been allowed to slumber for well on to five years may well cause some wonder and not a little speculation.

The contract was with reference to the acquisition by Meyer and Webb of the defendant's interests in the Canada Atlantic and Arnprior and Parry Sound Railway systems, paying therefor the sum of \$10,000,000. These interests were largely in the shape of shares in the capital stock and bonds of the railway companies. In the interval between the 2nd June, 1902, and the commencement of this action, the defendant had sold and parted with his entire interests, without any protest or objection, on the part of Meyer, Webb, or the plaintiff, being brought to the notice of the defendant.

It is tolerably plain that Webb was the only one of those concerned in the enterprise of acquiring the control of the Canada Atlantic and Arnprior and Parry Sound Railway systems who had

any idea of retaining them in his own hands. Apparently the project he had in mind was to unite them with the Rutland Vermont system, in which he was largely interested. But when, in consequence of the financial conditions in New York, and perhaps for other reasons, he became incapable of carrying out his intentions, and the project fell through so far as he was concerned, Meyer, who assumed, as the plaintiff alleges, to take up the contract again, could only hope to be placed in a position to perform it by interesting capitalists in it as an investment. And this, on the plaintiff's own shewing, they had not succeeded in doing up to the day named in the contract for its performance. The only chance was to gain further time, either by leading the defendant to suppose that Meyer was entitled to it as a matter of right or by persuading him to accord it as a matter of grace. Failing in this, he dropped the matter, and so it remained, as far as the defendant was concerned, until the commencement of the action. The question of damages was not entered upon in evidence at the trial, the ascertainment of these being left to a reference in case the plaintiff established his right to them. It is difficult to understand why, if, as the plaintiff now contends, a valid claim for damages accrued to him on the 3rd June, 1902, he deferred proceedings to enforce it until so much time elapsed. Certainly the ascertainment of the quantum would have been attended with much less difficulty at that time than would be the case now.

But, if the defendant's actions rendered him liable to the plaintiff for damages, possibly the defendant may not be entitled to complain of the delay.

Fortunately, the delay has not been the occasion of any loss of testimony. Most of the persons actively concerned in the transactions were present and testified at the trial, the exceptions being Meyer, Dr. Webb, and Mr. Button, whom the plaintiff might have called, but did not. So far as there is a conflict of testimony with regard to the facts of the case, the trial Judge's findings are against the plaintiff, and, upon the weight of evidence, properly so.

One very important question in dispute is as to which of the parties was responsible for the failure to complete on the day named in the contract. It is common ground that, on the terms of the contract, the sum of \$10,000,000, less the sum of \$250,000, was to be paid over to the defendant on or before the 1st day of

C. A.  
1908  
—  
SPRAGUE  
v.  
BOOTH.  
—  
MOSS, C.J.O.

C. A.

1908

SPRAGUE

v.

BOOTH.

MOSS, C.J.O.

June, 1902, in consideration of the transfer of his shares in the capital stock in the railways and the delivery of bonds of the railway company as provided in the agreement.

It was part of Meyer's project that the \$10,000,000 should be raised or provided by means of the issue of bonds of the Canada Atlantic Railway Company, and the agreement sets forth that the said company contemplates issuing bonds to be secured by a mortgage upon the bridge and approaches over the St. Lawrence river of about \$1,000,000; and also bonds of the said company to be secured by a first mortgage upon the franchise and property of the railway for an additional \$10,000,000; the said two classes of bonds, when issued, except \$1,608,000 thereof, which should be deposited with the trustee named in the new mortgage for the purpose of retiring and redeeming an equal amount of \$1,608,000 outstanding bonds then secured upon a portion of the road, to be, at once upon the issuing of the same, delivered to the defendant, and thereafter, with his shares of the capital stock, be delivered to Meyer or his assigns on payment of the consideration. And Meyer agreed to pay the cost of issuing and engraving the said issue of bonds. The carrying into effect of these provisions involved not only the preparation of the two classes of bonds and of the mortgages securing them, but also the taking of the necessary steps for securing the validity of their execution and issue by passing the appropriate resolutions and obtaining the concurrence of the shareholders. The agreement does not specify by whom these matters were to be attended to. Upon their issue, the bonds and probably the mortgages securing them were to be delivered to the defendant, who was to deliver them, with his capital stock, upon payment to him of the amount of the consideration, but the bonds were not to be payable to him, or to be his property, and he did not expressly undertake to procure the delivery of the bonds to himself upon their issue. Upon the evidence it plainly appears that Meyer, who was bound to pay the cost of issuing and engraving the issue of bonds, assumed the duty of finally settling the form of the bonds and mortgages and of getting them duly engraved and printed ready to be executed by the proper officials on behalf of the Canada Atlantic Railway Company, while, on the other hand, it was understood that the defendant would do or cause to be done all that was necessary to procure the concurrence of the shareholders in due form. There was ample



time between the 22nd January and the 1st June to permit of all that was required to be done, and for the delays that did take place the defendant was in no wise responsible. By the 17th April matters had so far progressed that the form of bond had been settled and some of the bonds printed or engraved, and the form of the mortgages had been settled except in regard to some formal details. But on that day Meyer assigned the contract to Webb, who on the same day notified the defendant of the fact, and on the next day requested the defendant to stay the signing of the bonds. On the 28th April Meyer notified the defendant of the assignment to Webb, and that he was to deal with the latter in carrying out the agreement. Up to this time matters had been conducted on the one side by Mr. Regensburger, representing Mr. Meyer, and on the other by Mr. John Christie, the solicitor for the defendant and for the Canada Atlantic Railway Company.

But Webb took the conduct of affairs out of Mr. Regensburger's hands and transferred it to Mr. Button, his legal adviser, who was also counsel for the Rutland Railway. Thereupon ensued delay through defaults on the part of Mr. Button.

However, by the 3rd May matters were in such a position that it was thought by all parties that—acting upon a suggestion made by Webb in a letter to the secretary of the Canada Railway Company of the 25th April—Mr. Jackson Booth, the president, and Mr. Fleck, the secretary of the company, might go to New York for the purpose of signing the bonds and mortgages.

Accordingly they went, arriving in New York on the 4th May, but, after staying several days, they were compelled to return without having accomplished their mission. The cause was either the unwillingness or inability of Webb and his advisers to proceed with the transaction.

From that time on, as the learned trial Judge finds, there was no obstruction or delay by the defendant or any one in his behalf. The evidence shews that throughout he was ready, willing, and anxious to complete the contract within the time for completion fixed by it. A rest account, which the agreement required should be made, was opened, the resolutions of the shareholders had been passed, the transfers of the shares were ready—in fine, all that the agreement required of the defendant had been done—and, as

C. A.  
1908  
—  
SPRAGUE  
v.  
BOOTH.  
—  
MOSE, C.J.O.

C. A.

1908

SPRAGUE

v.

BOOTH.

MOSS, C.J.O.

soon as the executed bonds and mortgages were delivered to him in order that he might deliver them over to Webb or his representative, he was ready to complete the transaction. It is plain that before the end of May Webb had lost all hope of being able to carry out the contract, and had abandoned all intention of further endeavouring to do so. During the last days of May Mr. Regensburger reappeared, professing to represent Meyer, but without any assignment or proper evidence of a retransfer from Webb. On the 31st he came to Ottawa and saw Mr. Christie and the defendant. He had not with him the bonds and mortgages which were to be delivered to the defendant as preliminary to the latter delivering them, with his capital stock, upon payment of the \$10,000,000, nor had he the money with him. After unsuccessfully endeavouring by a series of flank movements to put the defendant in a position which might be construed as an acknowledgment that, notwithstanding the expiry of the time, the contract still remained open for completion, he returned to New York. And on the 3rd June, the time for performance fixed by the contract having elapsed, the defendant notified Meyer and Webb to that effect, and that the contract was determined, and the deposit of \$250,000 forfeited.

The plaintiff questions the defendant's right to give the notice, and contends that the defendant wrongfully repudiated the agreement and refused to perform it, and that thereupon Meyer, and the plaintiff as his assignee, became entitled to maintain an action for damages against the defendant. If, notwithstanding what had occurred and the lapse of the time fixed for performance of the contract, it still remained on foot, the notice might be treated as a repudiation. But, if the contract had determined, and Meyer's and Webb's rights under it had come to an end, the mere giving of the notice could give no right of action. And that was the position on the day when the notice was given.

The case is, therefore, not one which entitles the plaintiff to contend that the defendant, while the contract was on foot, repudiated it so as to give the plaintiff the right to treat it as at an end and sue for damages.

It was argued that time was not expressly made of the essence of the agreement, and it stood unless and until the defendant, by express notice limiting a time for performance, made time of

the essence. But it seems plain that the case is one in which, even in equity, time would be deemed to be of the essence. The circumstances shew that time was regarded as of the essence.

The nature of the property, the fluctuating values of such holdings, the chances, changes, and risks to which it was exposed, the possibilities of loss arising from great financial disturbances or monetary stress such as actually happened in New York while this agreement was on foot, and the long time which was given within which the contract was to be carried out, all strongly tend to shew that it was never contemplated by any of the parties that, if it was not completed by the time fixed, it was to remain open for a further indefinite period.

To paraphrase the language of Knight Bruce, V.-C., in *Prendergast v. Turton* (1841), 1 Y. & C.C.C. 98, at p. 110, this is a railway property (there it was a mining property),—a property, therefore, of a mercantile nature, exposed to hazard, fluctuations, and contingencies of various kinds, requiring a large outlay, and producing, perhaps, a considerable amount of profit in one year, and losing it the next.

This is one of the cases in which, if the plaintiff had come promptly after the notice of the 3rd June, 1902, asking for specific performance, the Court would have been justified in refusing that relief, on the ground that, even in the contemplation of a Court of equity, time was to be deemed of the essence of the contract. The parties to the contract failed, while it was on foot, to exercise the diligence which was demanded of them in order to preserve and protect their rights in the premises. The plaintiff is unable to shew that the defendant's conduct led in any degree to the failure to perform.

On the contrary, it has been shewn, as the learned trial Judge found, that the position, when the time came to complete and make payment, was, that the defendant was not in default, and that Meyer and his assignee were both in default.

The defendant was not responsible for the non-completion according to the terms of the agreement. He in no way prevented its completion. That being so, the case of *Foster v. Anderson* (1908), 16 O.L.R. 565, to which we were referred by Mr. Nesbitt, can have no application.

In this state of the case, and even without taking into account

C. A.

1908

SPRAGUE

v.

BOOTH.

MOSS, C.J.O.

C. A.

1908

SPRAGUE

v.

BOOTH.

MOSS, C.J.O.

the subsequent delay, is the plaintiff entitled to maintain an action for damages and for a return of the \$250,000?

Putting the case for the plaintiff at the very highest, his position can be no better than that outlined by Fry, L.J., in *Howe v. Smith*, 27 Ch. D. 89, at p. 103, where, speaking of the equivalent of sec. 58 (7) of our Judicature Act, he said that the effect of it is that "the purchaser seeking damages is no longer obliged to prove his readiness and willingness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time after the stipulated day; and the inquiry therefore arises, whether the purchaser in the present case could aver and prove such readiness and willingness within a reasonable time."

The learned Lord Justice was dealing with a case in which time was not expressly made of the essence of the contract, and did not come within the class of cases in which, even in equity, time is to be deemed as of the essence; but, assuming that similar conditions applied here, what is the plaintiff's position? He has wholly failed to prove a case which would bring him within the rule.

As already pointed out, Webb, through whom the plaintiff claims, had, even before the stipulated time for completion had arrived, abandoned the contract and given up all intention of carrying it out. And he has never since manifested any serious intention of receding from that position. Meyer—who, the plaintiff alleges, was put back in his original position before the expiration of the stipulated time, an allegation which he has failed to prove—was not called to testify as to his readiness and willingness, and the evidence of others shews that he was heavily involved and so circumstanced financially and personally as to render it impossible to believe that he was or could have been ready and willing to complete within a reasonable time. The plaintiff himself was not at that time in any privity with the defendant, nor was he dealing or professing to deal with him, and, save through the instruments of transfer which he puts forward, he has no cause of action for damages.

The other complete answer is, that, time being of the essence of the contract in equity as well as at law in this case, no action



for damages can be maintained. The plaintiff fails because there is no actionable breach by the defendant.

So, also, if the plaintiff had sought specific performance or in the alternative damages under the provisions commonly known as Lord Cairns's Act, and failed, as he must have failed, as to specific performance, he would also fail as to damages: *White v. Bobby* (1877), 26 W.R. 133.

Then as to the return of the \$250,000: under the agreement as modified this sum was paid to the defendant as a deposit as security for the due carrying out of the agreement, with the express stipulation that on default being made in the payment of the \$10,000,000, under the terms of the agreement, on the 1st June, 1908, or sooner, the said sum of \$250,000 should be thereupon forfeited and remain the defendant's absolute property as liquidated damages for such default, without any conditions for or any right to repayment or redemption of the same. These conditions are substantially the same as the law attaches to a deposit made on a contract of sale and purchase.

There is nothing in this case to take it out of the ordinary rule that, if the contract be performed, the money is brought into account as part payment of the purchase-money, but, if the purchaser make default, it may be retained.

And the agreement shews that this was the intention and contract of the parties. And there is no ground for relief against the forfeiture, if it could be treated as one.

The delay alone would form a very serious obstacle in the way of this relief.

The appeal should be dismissed with costs.

MEREDITH, J.A.:—The purchaser was, under the terms of the agreement, entitled to a valid transfer to him of the bonds in question and other the property which was purchased, when the payment for them was made. The vendor was not in a position to make such a formal transfer on the day when the payment was to have been made, but only because the bonds and deeds had not been prepared. Steps had been taken to have the bonds prepared and executed, but those steps remained uncompleted through the acts of the assignor of the plaintiff. When the time came for completion, the assignee of the purchaser had receded

C. A.  
1908  
SPRAGUE  
v.  
BOOTH.  
MOSS, C.J.O.

C. A.

1908

SPRAGUE

v.

BOOTH.

Meredith, J.A.

from, and quite given up his interest in, the transaction; and the other persons interested were not in a position to carry out the transaction; that was, beyond question, the position of affairs; and there was nothing to indicate that such persons could put themselves in a position to carry out the transaction; they were not in that position, and could not carry it out. There was clearly a substantial failure of the purchaser to carry out the transaction on his part; and, in the terms of the agreement between the parties, the \$250,000 became the property of the vendor.

Then is there anything in law or equity preventing the words which the parties employed being given effect to?

There is, in my opinion, nothing. The case is the everyday one of a deposit made by a purchaser to insure the carrying out of the contract on his part. The unstable questions respecting "liquidated damages" and "forfeiture" do not arise.

I would dismiss the appeal.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

[Affirmed by the Judicial Committee of the Privy Council: *Sprague v. Booth*, [1909] A.C. 576.]

END OF VOLUME XXI.

## APPENDIX.

---

Cases reported in the Ontario Law Reports and Ontario Weekly Notes decided on appeal to the Supreme Court of Canada, reported since the publication of volume 20 Ontario Law Reports:—

FRALICK v. GRAND TRUNK R.W. Co., 1 O.W.N. 309, reversed by the Supreme Court of Canada: FRALICK v. GRAND TRUNK R.W. Co., 43 S.C.R. 494.

PETERBOROUGH HYDRAULIC POWER Co. v. McALLISTER, 17 O.L.R. 145, affirmed by the Supreme Court of Canada: ONTARIO BANK v. McALLISTER, 43 S.C.R. 338.





# INDEX.

---

## ABDUCTION.

*See* CRIMINAL LAW, 1.

## ACCOMPLICE.

*See* CRIMINAL LAW, 2.

## ACCOUNT.

*See* COMPANY, 4, 5—DIVISION COURTS.

## AGENT.

*See* PRINCIPAL AND AGENT.

## ALIMONY.

*See* HUSBAND AND WIFE, 1.

## AMENDMENT.

*See* LIQUOR LICENSE ACT, 2, 3—STREET RAILWAYS, 2.

## ANTE-NUPTIAL CONTRACT.

*See* HUSBAND AND WIFE, 2.

## APPEAL.

*See* COMPANY, 3, 6—CRIMINAL LAW, 1, 3—LIQUOR LICENSE ACT, 3, 4.

## ASSESSMENT AND TAXES.

*See* LANDLORD AND TENANT, 1.

## ASSESSMENT ROLL.

*See* MUNICIPAL CORPORATIONS, 9.

## ASSIGNMENT OF CALLS.

*See* COMPANY, 1.

## ASSIGNMENT OF CLAIM FOR TORT.

*See* NEGLIGENCE, 2.

## ASSIGNMENT OF POLICY.

*See* INSURANCE, 1.

## ATTACHMENT.

*See* SOLICITOR.

## ATTORNEY-GENERAL.

*See* LIQUOR LICENSE ACT, 3.

## BALLOTS.

*See* MUNICIPAL CORPORATIONS, 4.

## BANKS AND BANKING.

1. *Contract between Banks—Advances—Pledge or Sale of Assets—Bank Act, secs. 99-111—Construction and Validity of Contract—Powers of Directors—Interpretation Act, sec. 30—Bank Act, sec. 76—Winding-up of Bank—Proof of Claim.*]—By an agreement made between the Ontario Bank and the Bank of Montreal on the 13th October, 1906, it was recited that, owing to recently discovered misconduct of an officer of the Ontario Bank, the directors of that bank deemed it necessary and expedient to make immediate provision for payment or taking up of its debts and liabilities, and had applied to the Bank of Montreal for that purpose, and had exhibited to the Bank of Montreal a statement of its assets and liabilities as of the 29th September, 1906, as summarised in the recital, and that the Ontario Bank had since continued to carry on its business in the ordinary course. The agreement then pro-

vided (clause 1) that the Ontario Bank warranted the assets and liabilities to be as set out; (clause 2), that, "in consideration of the premises, the Bank of Montreal hereby agrees to purchase by way of discount and of rediscount at the rate of six per cent. all the call and current loans and overdue debts of the Ontario Bank," etc. This clause and clauses 3 to 8 provided for advances to be made by the Bank of Montreal and the security it was to receive therefor. By clause 9, the Ontario Bank "agrees that it will not carry on business except for the purpose of selling and realising on its assets and of otherwise providing and by means of the shareholders' double liability furnishing the moneys necessary for the payment as herein provided of its notes in circulation, debts, liabilities, and obligations, including therein all advances and interest and other obligations that may be owing or due to the Bank of Montreal under the provisions hereof or otherwise." Clauses 10 to 14 provided the machinery by which the arrangement between the two banks was to be worked out. Clause 15 bound the Bank of Montreal to account to the Ontario Bank for any surplus realised from the securities transferred to it under the agreement. And clause 16 provided for the payment by the Bank of Montreal to the Ontario Bank of \$150,000 for any indirect benefit derived by the Bank of Montreal under the agreement.

An order having been made on the 29th September, 1908, for the winding-up of the Ontario Bank under the Dominion Winding-up Act, the Bank of Montreal presented a claim as a creditor, and the question then arose whether

the above agreement was valid and binding in whole or in part upon the Ontario Bank and its shareholders, so as to form a sufficient basis for taking an account of what was due to the Bank of Montreal:—

*Held*, that the transaction was not a sale of the assets of the Ontario Bank within the provisions of secs. 99 to 111 of the Bank Act; that it was an arrangement which was within the powers of the board of directors to enter into; that it was binding; and that the Bank of Montreal was entitled to make proof of its claim against the estate of the Ontario Bank upon the footing of it.

*Bank of Australasia v. Breillat* (1847), 6 Moo. P.C. 152, specially referred to.

*Per Moss, C.J.O.*:—A fair reading of the whole instrument, giving to each part its proper effect in relation to the remainder, and bearing in mind the evident object and intention of the parties, leaves no reasonable doubt as to its meaning and effect. The strongest ground in favour of the contention that the transaction was a sale was the use in clause 2 of the expression "purchase by way of discount and of rediscount at the rate of six per cent." But these words merely describe a species of dealing with a particular class of securities which is quite as consistent with a pledge as an absolute sale.

*Per MACLAREN, J.A.*:—The banks had the right to make the agreement under the law as it stood in 1900, before the Bank Amendment Act of that year (now secs. 99 to 111 of the Bank Act, R.S.C. 1906, ch. 29), the powers conferred by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 30, and by sec. 76 of the Bank Act,

being wide enough to include the transaction in question; and the amendment of 1900 did not take away the previous powers of the directors by requiring such an agreement to be carried out exclusively under the provisions and subject to the formalities of secs. 99 to 111.

Decisions of BRITTON, J., and an Official Referee, affirmed. *Re Ontario Bank, Bank of Montreal's Claim*, 1.

2. *Illegal Trafficking by Bank in its own Shares—Directors—Promissory Notes Given to Repair Wrongdoing—Transfer of Shares—Consideration—Agreement—Indemnity—Holder in Due Course—Notice or Knowledge of Illegality—Evidence—Onus.*—The money of a chartered bank was used in purchasing shares of its own stock to the extent of about \$400,000. The shares acquired stood in the names of various nominees of the bank, who undertook no personal responsibility. The shares were bought to be again sold, and the plan was to keep up the price of the stock and to make possible profits—the whole transaction being arranged and carried out by the general manager of the bank:—

*Held*, that the money was illegally withdrawn from the funds of the bank and used in violation of the Bank Act, R.S.C. 1906, ch. 29, sec. 76; the transaction amounted to an illegal trafficking in the shares, was *ultra vires*, in disregard of public policy, and placed in jeopardy the charter of the bank.

The directors of the bank, in order to save the bank, divided the shares so illegally acquired among themselves and their friends, and they and their friends

gave promissory notes to the bank for the shares. In getting notes from their friends and in putting shares in their names, the directors assured them that they were incurring no risk—that they would never be called upon to pay—that the shares were to be held in trust for the bank, and that all would shortly be paid out of the sale of the stock. These notes were indorsed by the bank to the plaintiff, and the plaintiff sued the makers of the notes thereon:—

*Held*, that, although the defendants considered that the notes were given for the accommodation of the bank, that was an understanding not recognised by any one representing the shareholders, and not binding on the bank as a corporate body; and on this branch of the case nothing was proved sufficient to outweigh the legal consequences arising from the making of negotiable promissory notes.

But, regarding the notes as given for value, represented by the transfer of shares to each defendant, and in the whole representing the \$400,000 of the bank's money illegally expended, which was the consideration, or at any rate a part of the consideration, as between the bank and the defendants, the bank had not the power to transfer the shares or enforce payment for them; the original acquisition of the shares was not merely voidable but void; it was a nullity, not to be validated by lapse of time or by any action of the bank or the shareholders; and the transfer of these shares to the defendants, in exchange for the notes sued on, was a sale of the shares, and a further act of illegality in violation of the statute; the bank had no power



to sell or transfer the shares illegitimately acquired.

The bank could not undertake to indemnify the defendants in regard to their having become holders of the stock; the expenditure of the bank's money was a misfeasance in the first place, and any indemnification would be an agreement further to misuse the shareholders' money.

The bank had no legal title to the shares, and could confer none; so that, in the hands of any one having knowledge or notice of the facts or of the violation of the statute, the notes could not be enforced by action; and, upon the evidence, the plaintiff, as to fifteen of the notes sued upon, had sufficient notice of the situation to prevent his recovering.

As to the other nine notes, a case of illegal consideration was shewn, and the law cast the burden of proof upon the holder to prove both that value had been given and that it had been given in good faith without notice. The plaintiff had not given evidence on this head, and had not satisfied the Court of his right to recover; and, in the circumstances, the case should not be opened up to give him an opportunity to do so. *Stavert v. McMillan*, 245.

See GIFT.

---

### BASTARD.

See WILL, 3.

---

### BENEFICIARY.

See INSURANCE, 1.

---

### BENEFIT SOCIETY.

*"Sick Benefits"* — *Refusal of Claim* — *Certificate of Medical Officer* — *Domestic Tribunals* — *Interference by Court* — *Jurisdiction* —

*Erroneous Certificate* — *"Legal Fraud."*] — The plaintiff, a member of the defendant "court," a subordinate branch of a friendly or benefit society, incorporated by a Dominion statute and registered under the Ontario Insurance Act, applied for "sick benefits," to which he would have been entitled under the laws of the society, upon a satisfactory certificate from the medical officer of the court. The medical officer, however, certified that the plaintiff's illness was caused or contributed to by the excessive use of intoxicating liquors, and the court refused the benefits. This was affirmed by the various appellate bodies having jurisdiction under the laws of the society, but none of them had any evidence before them other than the certificate of the medical officer, and two certificates of a contrary opinion given at the instance of the plaintiff by another physician. There was no tender of other evidence by the plaintiff. In an action brought for the recovery of the amount of the sick benefits, the trial Judge heard evidence as to the cause of illness, and found that it was not caused or contributed to in the way certified to by the medical officer, and that the certificate, though honestly given, was founded upon an erroneous diagnosis:—

*Held*, that the matter was one to be disposed of by the methods of the society, to which the plaintiff subjected himself on becoming a member; and the action of the society was final, unless it was made to appear that it was contrary to natural justice, or in violation of the rules of the body, or done *malâ fide*; an erroneous medical certificate, given honestly, but by mistaken diagnosis, cannot



be regarded as fraudulent; "legal fraud" does not exist in a sense distinguishing it from dishonesty or moral wrongdoing.

Judgment of the County Court of York, in favour of the plaintiff, reversed. *Thompson v. Court Harmony* No. 7045 *Ancient Order of Foresters*, 303.

## BILLS AND NOTES.

See PROMISSORY NOTES.

## BOARD OF RAILWAY COMMISSIONERS.

See RAILWAY, 1, 4.

## BONUS.

See COMPANY, 3.

## BOUNDARY LINE.

See MUNICIPAL CORPORATIONS, 7.

## BRIDGE.

See MUNICIPAL CORPORATIONS, 7.

## BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW.

## BUILDING.

See NEGLIGENCE, 1, 2—WILL, 1.

## BY-LAWS.

See COMPANY, 6—MUNICIPAL CORPORATIONS.

## CARRIERS.

See RAILWAY.

## CASES.

*Abrath v. North Eastern R.W. Co.* (1883-6), 11 Q.B.D. 79, 440, 11 App. Cas. 247, explained.]—See MALICIOUS PROSECUTION.

*Alexander, In re*, [1910] W.N. 36, followed.]—See WILL, 1.

*Allen v. Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 510, affirmed.]—See RAILWAY, 2.

*Archibald v. McLaren* (1892), 21 S.C.R. 588, followed.]—See MALICIOUS PROSECUTION.

*Armour and Township of Onondaga, In re* (1907), 14 O.L.R. 606, 608, followed.]—See MUNICIPAL CORPORATIONS, 5.

*Auerbach v. Hamilton* (1909), 19 O.L.R. 570, followed.]—See PLEADING, 1.

*Bahia and San Francisco R.W. Co., In re* (1868), L.R. 3 Q.B. 584, followed.]—See DAMAGES.

*Bank of Australasia v. Breillat* (1847), 6 Moo. P.C. 152, specially referred to.]—See BANKS AND BANKING, 1.

*Beardmore v. City of Toronto* (1909), 20 O.L.R. 165, affirmed.]—See CONSTITUTIONAL LAW.

*Bell and Corporation of Elma, Re* (1906), 13 O.L.R. 80, explained.]—See MUNICIPAL CORPORATIONS, 5.

*Birmingham v. Hungerford* (1869), 19 C.P. 411, followed.]—See PUBLIC SCHOOLS.

*Bower v. Peate* (1876), 1 Q.B.D. 321, applied and followed.]—See NEGLIGENCE, 1.

*Brenner v. Toronto R.W. Co.* (1907), 15 O.L.R. 195, 198, followed.]—See STREET RAILWAYS, 1.

*British Seamless Paper Box Co., In re* (1881), 17 Ch.D. 467, specially referred to.]—See COMPANY, 5.

*Bryan, In the Estate of*, [1907] P. 125, 76 L.J.N.S.P. 30, distinguished.]—See WILL, 4.

*Canadian Oil Works Corporation, In re, Hay's Case* (1875), L.R. 10 Ch. 593, specially referred to.]—See COMPANY, 5.

- Champion, In re*, [1893] 1 Ch. 101, followed.]—See WILL, 1.
- Childs v. Lissaman* (1904), 23 N.Z.L.R. 945, specially referred to.]—See NEGLIGENCE, 2.
- Chinnock v. Marchioness of Ely* (1865), 4 De G.J. & S. 638, followed.]—See CONTRACT, 1.
- Coalport China Co., In re*, [1895] 2 Ch. 404, distinguished.]—See COMPANY, 6.
- Connors v. Darling* (1864), 23 U.C.R. 544, 552, followed.]—See LIQUOR LICENSE ACT, 1.
- Dalton v. Angus* (1881), 6 App. Cas. 740, applied and followed.]—See NEGLIGENCE, 1.
- Dickinson v. Valpy* (1829), 10 B. & C. 128, 140, followed.]—See PARTNERSHIP.
- Dominion Express Co. v. Maughan* (1910), 20 O.L.R. 310, reversed.]—See PARTNERSHIP.
- Duncan and Town of Midland, In re* (1908), 16 O.L.R. 132, head-note in, corrected.]—See MUNICIPAL CORPORATIONS, 1.
- Fancourt v. Heaven* (1909), 18 O.L.R. 492, distinguished.]—See MALICIOUS PROSECUTION.
- Flatt and United Counties of Prescott and Russell, In re* (1890), 18 A.R. 1, applied and followed.]—See MUNICIPAL CORPORATIONS, 9.
- Ford v. Whitmarsh* (1840), Hurl. & Walm. 53, followed.]—See PARTNERSHIP.
- Foster v. Toronto R.W. Co.* (1899), 31 O.R. 1, referred to.]—See MUNICIPAL CORPORATIONS, 5.
- Giles and Town of Almonte, Re* (1910), 1 O.W.N. 698, affirmed.]—See MUNICIPAL CORPORATIONS, 4.
- Gillett v. Peppercorne* (1840), 3 Beav. 78, followed.]—See PRINCIPAL AND AGENT.
- Gresham Life Assurance Society, In re* (1874), L.R. 8 Ch. 446, distinguished.]—See COMPANY, 6.
- Hamilton v. Cousineau* (1892), 19 A.R. 203, not followed.]—See MALICIOUS PROSECUTION.
- Harper, Re* (1892), 23 O.R. 63, followed.]—See LIQUOR LICENSE ACT, 3.
- Hess Manufacturing Co., In re* (1894), 23 S.C.R. 644, specially referred to.]—See COMPANY, 5.
- Hessey v. Quinn* (1910), 20 O.L.R. 442, varied.]—See LANDLORD AND TENANT, 3.
- Hill v. Hill* (1904), 8 O.L.R. 710, distinguished.]—See GIFT.
- Hunt qui tam v. Shaver* (1895), 22 A.R. 202, followed.]—See LIQUOR LICENSE ACT, 3.
- Ihde v. Starr* (1909), 19 O.L.R. 471, affirmed.]—See EASEMENT.
- Jones v. Spencer* (1897), 77 L.T.R. 536, followed.]—See STREET RAILWAYS, 1.
- Jones v. Toronto and York Radial R.W. Co.* (1909), 20 O.L.R. 71, affirmed.]—See STREET RAILWAYS, 3.
- Karry and City of Chatham, Re* (1909), 20 O.L.R. 178, affirmed.]—See MUNICIPAL CORPORATIONS, 10.
- Kerr and Town of Thornbury, Re* (1906), 8 O.W.R. 451, explained.]—See MUNICIPAL CORPORATIONS, 5.
- King, The, v. Tate*, [1908] 2 K.B. 680, discussed.]—See CRIMINAL LAW, 2.
- King, The, v. Warren* (1909), 2 Cr. App. R. 194, 25 Times L.R. 633, discussed.]—See CRIMINAL LAW, 2.
- Lake Erie and Detroit River R.W. Co. v. Sales* (1896), 26 S.C.R. 663, distinguished.]—See RAILWAY, 2.
- Lake Ontario Navigation Co., Re* (1909), 20 O.L.R. 191, distinguished.]—See COMPANY, 3.
- Macdonald and Mail Printing and Publishing Co., In re* (1876), 6 P.R. 309, distinguished.]—See COMPANY, 6.
- McDougall v. Lindsay Paper*

*Mill Co.* (1884), 10 P.R. 247, 252, approved and followed.]—See COMPANY, 2.

*McGrath and Town of Durham, In re* (1908), 17 O.L.R. 514, followed.]—See MUNICIPAL CORPORATIONS, 5.

*McIntosh v. Leckie* (1906), 13 O.L.R. 54, followed.]—See EXECUTION.

*Martin v. Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9, specially referred to.]—See RAILWAY, 2.

*Meunier, In re*, [1894] 2 Q.B. 415, discussed.]—See CRIMINAL LAW, 2.

*Michael v. Hart*, [1901] 2 K.B. 867, [1902] 1 K.B. 482, discussed.]—See DAMAGES.

*Moriarity v. Harris* (1905), 10 O.L.R. 610, specially referred to.]—See LIQUOR LICENSE ACT, 1.

*Mosely v. Koffyfontein Mines Limited*, [1904] 2 Ch. 108, followed.]—See COMPANY, 3.

*Mykel v. Doyle* (1880), 45 U.C.R. 65, approved and followed.]—See EASEMENT.

*Nettleton v. Town of Prescott* (1908), 16 O.L.R. 538, affirmed.]—See MUNICIPAL CORPORATIONS, 8.

*Newman v. Grand Trunk R.W. Co.* (1910), 20 O.L.R. 285, affirmed.]—See RAILWAY, 1.

*Nichols v. Lynn and Boston R.R. Co.* (1897), 168 Mass. 528, approved and followed.]—See STREET RAILWAYS, 2.

*O'Connor v. Townships of Otonabee and Douro* (1874), 35 U.C.R. 73, distinguished.]—See MUNICIPAL CORPORATIONS, 7.

*OOREGUM GOLD MINING CO. OF INDIA v. ROPER*, [1892] A.C. 125, followed.]—See COMPANY, 3.

*Penny v. Wimbledon Urban District Council*, [1899] 2 Q.B. 72, applied and followed.]—See NEGLIGENCE, 1.

*Pickett and Township of Wainfleet, Re* (1897), 28 O.R. 464, 467, followed.]—See MUNICIPAL CORPORATIONS, 2.

*Regina v. Beckwith* (1859), 8 C. P. 274, discussed.]—See CRIMINAL LAW, 2.

*Rex v. Akers* (1910), 1 O.W.N. 672, explained.]—See LIQUOR LICENSE ACT, 3.

*Rex v. Miller (No. 2)* (1909), 19 O.L.R. 288, followed.]—See LIQUOR LICENSE ACT, 3.

*Rex v. Teasdale* (1910), 20 O.L.R. 382, not followed.]—See LIQUOR LICENSE ACT, 3.

*Rishton v. Cobb* (1839), 5 My. & Cr. 145, explained and followed.]—See WILL, 2.

*Roberts v. Climie* (1881), 46 U.C.R. 264, specially referred to.]—See LIQUOR LICENSE ACT, 1.

*Rossiter v. Miller* (1878), 3 App. Cas. 1124, followed.]—See CONTRACT, 1.

*Ryan, Re* (1900), 32 O.R. 224, followed.]—See GIFT.

*St. Thomas's Hospital, Governors of, v. Charing Cross R.W. Co.* (1861), 1 J. & H. 400, 404, followed.]—See WILL, 1.

*Salomon v. Salomon*, [1897] A.C. 22, distinguished.]—See COMPANY, 4.

*Salter and Township of Beckwith, In re* (1902), 4 O.L.R. 51, followed.]—See MUNICIPAL CORPORATIONS, 3.

*Saltfleet, In re Local Option By-law of the Township of* (1908), 16 O.L.R. 293, 302, held not applicable.]—See MUNICIPAL CORPORATIONS, 2.

*Selkirk v. Windsor Essex and Lake Shore Rapid R.W. Co.* (1909), 20 O.L.R. 290, reversed.]—See COMPANY, 2.

*Smith v. City of London* (1909), 20 O.L.R. 133, approved.]—See CONSTITUTIONAL LAW.



*Still v. Hastings* (1907), 13 O.L. R. 322, 324, followed.]—See MALICIOUS PROSECUTION.

*Talbot v. Cody* (1875), 10 Ir. R. Eg. 138, specially referred to.]—See GIFT.

*Taylor v. Scott* (1899), 30 O.R. 475, explained.]—See LIQUOR LICENSE ACT, 3.

*Toronto, City of, v. Virgo*, [1896] A.C. 88, distinguished.]—See MUNICIPAL CORPORATIONS, 10.

*Winn v. Bull* (1877), 7 Ch.D. 29, followed.]—See CONTRACT, 1.

*Woolsey v. Canadian Northern R.W. Co.* (1908), 11 O.W.R. 1030, 1036, followed.]—See STREET RAILWAYS, 1.

*Young and Township of Binbrook, Re* (1890), 31 O.R. 108, followed.]—See MUNICIPAL CORPORATIONS, 1.

*Young v. Corporation of Leamington* (1882-3), 8 Q.B.D. 579, 8 App. Cas. 517, followed.]—See PUBLIC SCHOOLS.

### CERTIORARI.

See CRIMINAL LAW, 3.

### COLLAPSE OF BUILDING.

See NEGLIGENCE, 1.

### COMPANY.

1. *Assignment of Amount Due by Subscriber for Shares—Security—Validity—Action by Assignee—Defence—Misrepresentations—Winding-up—Contributory—Approval of Assignment—Subsequent Reprobation.*]—The plaintiff, claiming under an assignment from an incorporated company, sued to recover moneys alleged to be due by the defendant in respect of shares of the capital stock of the company for which the defendant was a subscriber. The assignment was made to the plaintiff as security only for money

lent. An order was made, under the Winding-up Act of Canada, for the winding-up of the company, before any steps were taken by the defendant to repudiate the shares, on the ground of misrepresentations alleged to have been made in order to induce him to subscribe for them, or on any other ground:—

*Held*, that, even if the defendant had made out a case which would, before the commencement of the winding-up, have entitled him to rescission, it would have been no answer to an application by the liquidator to place him on the list of contributories; and he was precluded in the same way from setting it up as an answer to the plaintiff's claim.

In the winding-up the liquidator sought to have the defendant placed on the list of contributories in respect of the shares in question, and the defendant succeeded in having his name removed from the list, on the ground that the unpaid calls had been assigned to the plaintiff:—

*Held*, that the defendant, having escaped from liability as a contributory by establishing the assignment under which the plaintiff claimed, could not now attack the validity of the assignment, either on the ground of misrepresentations or on the ground that the directors had no authority to borrow; he could not approbate and reprobate. *Stephens v. Riddell*, 484.

2. *Electric Railway Company—Powers of Provisional Directors—Special Act 1 Edw. VII. ch. 92, sec. 9 (O.)—General Electric Railway Act, sec. 44—Contract—Sanction of Shareholders.*]—Section 9 of the special Act 1 Edw. VII. ch. 92 (O.), incorporating the defendant



company, enacts that the provisional directors may agree to pay for the services of persons who may be employed by the directors for the purpose of assisting the directors in furthering the undertaking, or for the purchase of the right of way, and any agreement so made shall be binding on the company:—

*Held*, that the express language of the special Act prevails over the general provision (sec. 44) of the Electric Railway Act, R.S.O. 1897, ch. 209, all the clauses of which, except so far as inconsistent, were, by sec. 12 of the special Act, incorporated with and deemed to be a part of the special Act; and, therefore, the provisional directors had power to bind the company by making the contract sought to be enforced, a contract to pay the plaintiffs for services in furthering the company's undertaking.

The special Act, sec. 9, says that this can be done by the provisional directors "when sanctioned by a vote of the shareholders at any general meeting:—"

*Held*, approving and following *McDougall v. Lindsay Paper Mill Co.* (1884), 10 P.R. 247, 252, that the plaintiffs' contract was not affected by the non-observance of this direction; and, apart from that, the contract was approved, before and after it was made, by the whole body of shareholders, though not formally assembled in general meeting.

Judgment of RIDDELL, J., 20 O.L.R. 290, which was in favour of the plaintiffs against the individual defendants, reversed, and judgment directed to be entered for the plaintiffs against the company. *Selkirk v. Windsor Essex and Lake Shore Rapid R.W. Co.*, 109.

3. *Issue of New Shares—Contract—Construction—Purchase of Inventions—Transfer of Common Shares—Bonus to Purchasers of Preferred Shares—Colourable Transaction—Ultra Vires—Declaration as to Part of Contract—Status of Shareholders to Maintain Action—Parties—Company Made Defendant—Judgment Varied in Favour of Non-appealing Defendant.*—The defendant company was incorporated in 1901, under the Ontario Companies Act, with a capital stock of \$700,000. On the 22nd July, 1907, the directors adopted a by-law to increase the stock to \$1,500,000, by the issue of 50,000 shares of new common stock of the par value of \$10 each, "which may be issued as a bonus, share for share," and by the issue of 30,000 shares of new preferred stock of the par value of \$10 each, "which will be sold for cash," and "that the new shares, both common and preferred, be issued and allotted in such manner and proportions as the directors of the company may deem proper for the benefit of the company." This by-law was approved by the shareholders at a general meeting. Supplementary letters patent were granted authorising the increase of the stock to \$1,500,000 by the issue of \$800,000 shares of \$10 each, all of common stock. The directors each year appointed an executive committee, as authorised by the by-laws of the company, to do all things that the directors of the company could do, with the limitation that the committee should report to the board of directors. After the increase in the capital stock, the committee on the 18th June, 1908, resolved that 50,000 shares of the common stock be allotted to McB. in accordance with his application

of the 16th June, 1908. By an agreement, bearing that date, between McB. and the company, it was recited that McB. was in possession of certain new and valuable discoveries (described), and had agreed to transfer his interest therein to the company, in consideration of the transfer to him of 50,000 shares of common stock, on the terms and conditions set forth, among which were: that he was immediately to apply for 50,000 shares of common stock; he was to be called upon to pay over at once only \$10, being the par value of one share; to transfer to the company all his rights for Canada and one-half interest in his rights for other countries; he was to transfer 40,000 shares to a person to be mutually agreed upon between himself and the president of the company, so that the 40,000 shares, or part thereof, in the sole discretion of such person, might be given as a bonus to purchasers of preferred stock, to promote the sale of the remainder of the company's stock; the remaining 10,000 shares to be transferred to the person agreed upon, not to be delivered until a Canadian patent should issue; this person to have the sole right to vote on the stock; and on the fulfilment of the agreement by McB. he to be released from liability on his application for shares:—

*Held*, that it must be taken that the application of McB. for the shares was in pursuance of this agreement, and that McB. was not to pay for the shares in cash or otherwise except as mentioned in the agreement.

The executive committee passed a resolution that the company purchase from McB. the patents described in the agreement, on the

terms set forth therein, and that the performance on his part thereof be accepted in satisfaction of the balance due for shares allotted to him; and on the 30th June, 1908, he signed a receipt for a certificate for 50,000 shares. This action was brought by certain shareholders of the company, who, by amendment made at the trial, sued on behalf of themselves and all other shareholders, for a declaration that the transfer of the shares to McB. was null and void, and that the shares should be retransferred to the company; a declaration that the issue of the \$800,000 additional stock was fraudulent and illegal and for cancellation thereof; and for other relief. The defendants were the company, McB., and C., the managing director and president. The defendants disputed the right of the plaintiffs to maintain the action:—

*Held*, that, if the acts complained of were *intra vires* the corporation, the action could not succeed; but the agreement provided an indirect method of selling the company's preferred stock with a bonus from the company of common stock; it was a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; and was *ultra vires* of the company; and therefore the plaintiffs were entitled to maintain the action.

The whole contract was not void, however; the real price for the inventions was the block of 10,000 shares of the 50,000, and to that block McB. was entitled; the contract was double, and the two portions were separable; the part relating to the 40,000 shares should be declared void; and the other should stand, the one being no

evidence of value or other evidence of fraud on which it could be impeached, even if the action were properly constituted.

*Oregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, and *Mosely v. Koffyfontein Mines Limited*, [1904] 2 Ch. 108, followed.

*Re Lake Ontario Navigation Co.* (1909), 20 O.L.R. 191, distinguished.

Where the effect of a judgment upon the appeal of one defendant is to establish the validity of a transaction between two defendants, the transaction may be declared valid in respect of the other, who has not appealed.

Judgment of CLUTE, J., varied in favour of the defendant B., who did not appeal, as well as of the other defendants. *Lindsay v. Imperial Steel and Wire Co.*, 375.

4. *Promoters — Sale of Businesses—Secret Profits—Liability to Account—Intention to Sell Shares to Public—President and Manager of Company Interested as Vendors—Directors not Independent—Absence of Knowledge.*—The plaintiff company was promoted and incorporated at the instance of and mainly through the intervention and exertions of the defendants M. and F. B. D., with the object of acquiring and taking over the business and property of two trading concerns, in both of which these two defendants were interested as shareholders or owners. These defendants were also directors and president and manager respectively of the plaintiff company. Shortly after the incorporation of the plaintiff company, the defendant F. B. D. made an offer to the company to sell the assets and goodwill of the two concerns for \$65,000 in cash and the assumption by the com-

pany of liabilities amounting to \$14,600. This offer was accepted by a by-law passed by the directors of the company, and both businesses were taken over. The cash payment of \$65,000 was to be made with moneys derived from sales of shares in the plaintiff company, which were then being offered to the public. Moneys were not procurable in this way, as it turned out; and a promissory note for \$65,000 was signed in the name of the plaintiff company by the defendant F.B.D. as managing director, indorsed by the defendants M., F. B. D., and G. R. D., and two of the other directors of the company, and discounted by a bank, through its local manager, the defendant C. The proceeds of the note were transferred to the credit of the company in the bank, and, by cheques of the company, signed by F. B. D. as manager, at least \$25,947.76, representing the profit of F. B. D. upon the sale of the two concerns, was divided among the four defendants:—

*Held*, that the agreement for the sale was not made on behalf of the company by an independent board of directors, to whom full disclosure had been made, and who were fully aware of the interests of the defendants M. and F. B. D. in the transaction. Upon the evidence, the affair was really arranged between the defendant F. B. D., the vendor, and at the same time the real manager of the plaintiff company, and the defendant M., the president of the plaintiff company, and at the same time interested in the selling concerns. It was not intended that the company should be one in which the shares are allotted to the owner of the business concerns taken over, in consideration



of the transfer of the property and business; from the beginning the intention was that ready money or its equivalent should be paid for the properties and businesses to be acquired, and that the necessary cash should be obtained by the sale of shares to the public.

*Salomon v. Salomon*, [1897] A.C. 22, distinguished.

*Held*, therefore, that the defendants were accountable to the company for the sum divided among them as profits, each to the extent to which he shared therein.

Judgment of MACMAHON, J., reversed. *Stratford Fuel Ice Cartage and Construction Co. v. Mooney*, 426.

5. *Sale of Property to Company by Director—Agreement with Co-directors—Secret Profits—Fraud on Future Shareholders—Class Action—Account of Profits—Laches—Liability—Form of Judgment—Costs—Lien—Salvage.*—A trustee cannot make a profit for himself without the full knowledge of all his *cestuis que trust*, and so the directors of a company, when it is intended to sell stock, stand in a fiduciary relation not only to those who are members at the time but to all who may come in afterwards.

*In re Hess Manufacturing Co.* (1894), 23 S.C.R. 644, *In re British Seamless Paper Box Co.* (1881), 17 Ch.D. 467, and *In re Canadian Oil Works Corporation, Hay's Case* (1875), L.R. 10 Ch. 593, specially referred to.

The five promoters of a company, who were the only shareholders, as shareholders and directors, assented to the purchase of property from one of them for the company for \$5,000, and each of the other four received from the

vendor a cheque for \$1,000, which was applied in payment of the liability of the four to the company for stock subscribed. The exact nature of the agreement did not appear from the evidence, but it was clear that each of the four received \$1,000 from the vendor, and that that fact was not disclosed to the shareholders who had been or were thereafter invited to take stock in the company:—

*Held*, in an action against the five original shareholders and the company, brought by two persons who afterwards became shareholders, that the four had received a secret profit for which they must account to the company. As the conduct of the four was fraudulent, a class action was maintainable; and the right to compel the defendants to account for the advantage so received could not be lost by any delay short of the appropriate statutory limitation.

*Held*, also, that the judgment should direct that the money be paid into Court, and that the plaintiffs should have a lien upon it for their costs, as between solicitor and client, properly incurred, on the principle of salvage, in creating the fund for the company.

Judgment of BRITTON, J., reversed. *Bennett v. Havelock Electric Light and Power Co.*, 120.

6. *Transfer of Paid-up Shares—Refusal of Directors to Allow—Dominion Companies Act—By-law—Ultra Vires—Leave to Appeal.*—A company incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79, purporting to act under the authority of sec. 80, passed a by-law providing that shareholders might, with the consent of the board of directors,



but not otherwise, transfer their shares, and that no person should be allowed to hold or own stock in the company without the consent of the board, and that all transfers of stock must be approved by the majority of the directors before being entered:—

*Held*, that it was beyond the powers of the company, as defined by the Act, to prohibit the transfer of paid-up shares.

Reference to secs. 45, 64-68, and 80.

*In re Macdonald and Mail Printing and Publishing Co.* (1876), 6 P.R. 309, *In re Gresham Life Assurance Society* (1874), L.R. 8 Ch. 446, and *In re Coalport China Co.*, [1895] 2 Ch. 404, distinguished.

Order of TEETZEL, J., requiring the company to allow a transfer of paid-up shares to which the directors had refused to consent, affirmed by a Divisional Court.

Leave granted to the company to appeal to the Court of Appeal. *Re Good and Jacob Y. Shantz Son & Co. Limited*, 153.

7. *Unsatisfied Judgment against—Action against Shareholder—Unpaid Shares—Ontario Companies Act, 1907, secs. 68, 69—Counterclaim against Company Sounding in Damages—Writ of Fi. Fa.—Return of Nulla Bona—Insufficiency—Defence—Set-off—Con. Rule 251—Dismissal of Action—Effect on Future Action.*]

The plaintiff recovered judgment against a company, incorporated under the Ontario Companies Act, for \$674.08 damages and \$22.54 costs. He at once placed a writ of *fi. fa.* in the Sheriff's hands, and requested a return of *nulla bona*, as he wished to commence proceedings against the shareholders of the company.

Thereupon the Sheriff, without inquiry as to available assets, indorsed on the writ a certificate that there were no goods and chattels in his bailiwick upon which he could levy as commanded by the writ. The writ was not returned, but remained in the Sheriff's possession. The plaintiff then began this action, to recover from the defendant, as one of the shareholders, the amount of the judgment. The defence was a simple denial. By counterclaim against the company the defendant set up that he sold the company certain property for \$2,468, and agreed to accept 2,468 shares of paid-up stock therefor; that he subscribed for 500 shares as part of the 2,468; that the company did not deliver the shares; that the shares had no market value; that, therefore, the company owed him \$2,468 as the purchase-price of the property; that the plaintiff and his father had not paid for their shares; that the plaintiff and the company were acting in collusion in the matter of the *fi. fa.* and direction to the Sheriff; and he claimed from the company (made defendants by counterclaim) the sum of \$2,468:—

*Held*, that the claim attempted to be set up in the counterclaim was not "relating to or connected with the original subject of the cause or matter," so as to come within the Ontario Judicature Act, sec. 57 (7); it was a claim sounding in damages against the company only; and the counterclaim was struck out.

Section 69 of the Ontario Companies Act, 1907, allows a set-off to be pleaded, but against the claim made in the action only, and not against any one other than the plaintiff.

*Held*, as to the plaintiff's claim in the action, that he had not proved himself within sec. 68 of the Companies Act, which provides that a shareholder shall not be liable to such an action "before an execution against the company has been returned unsatisfied in whole or in part."

History of the enactment and review of the authorities.

*Semble*, that, if this initial difficulty could have been got over, the plaintiff would have been entitled to recover; for the facts alleged in the counterclaim did not constitute a defence to the action; since the change in the Con. Rules made in 1888, under statutory authority (Con. Rule 373 of 1888, Con. Rule 251 of 1897), a defendant has not the right to set up as a defence by way of set-off a claim sounding in damages—he must set it up by way of counterclaim; and, the Companies Act, 1907, having been passed with the law in this condition, the shareholder, had the action been brought by the company, could not have pleaded by way of defence a set-off sounding in damages; but he might "set up" such a claim against the company if the company sued; and the Act says that he may plead by way of defence any set-off which he could set up against the company; there was no reason, therefore, why he could not plead this set-off by way of defence in the present action, although he would need to take another proceeding to set it up if the company had been plaintiff; but on the facts the defendant could not succeed.

*Semble*, also, that the dismissal of the action would not prevent another action being brought. *Grills v. Farah*, 457.

*See* DAMAGES—PRINCIPAL AND AGENT—PROMISSORY NOTES.

## CONDITION.

*See* RAILWAY, 1.

## CONSTABLES.

*See* LIQUOR LICENSE ACT, 3—MUNICIPAL CORPORATIONS, 8.

## CONSTITUTIONAL LAW.

*Powers of Provincial Legislature—Authorising Municipal Corporations to Acquire and Distribute Electric Energy—B.N.A. Act, sec. 92 (8), (10)—Validation of Contracts with Hydro-Electric Power Commission—Stay of Pending Actions—Right of Court to Inquire into Validity of Statutes.]—Held*, affirming the judgments of BOYD, C., and a Divisional Court, 20 O.L.R. 165, and approving the judgments of RIDDELL, J., and a Divisional Court in *Smith v. City of London* (1909), *ib.* 133, that the statutes in question in both actions were *intra vires* of the Ontario Legislature. *Beardmore v. City of Toronto*, 505.

## CONTRACT.

1. *Offer to Sell Mining Claim—Acceptance—Incomplete Contract—Terms—Uncertainty as to Price—References to Formal Contract to be Prepared.]—The defendants signed an offer in writing to sell to the plaintiff a mining claim, described, on the following terms: "10,000 in cash to be paid on the execution of a formal agreement; \$30,000 on the 1st day of October, 1908," and other sums on later dates; "and the delivery to ourselves or our nominees of 75,000 shares of fully paid non-assessable stock in a company to be organised on the property above mentioned . . ."* The plaintiff ac-

cepted the offer, by writing signed by him, in these words: "I hereby accept the above offer and undertake to complete the purchase and make the payments as above stated when formal documents signed:"—

*Held*, that, while neither the offer nor the acceptance could be said to be subject to the condition that a formal contract was to be prepared, yet, upon the construction of the document—the price to be paid being uncertain by reason of the indefiniteness as to the capital stock of the company, the value of the shares, etc., and references being made to a formal agreement to be signed—it must be taken that the parties intended, not merely that the terms agreed upon should be put into form, but that they should be subject to a new agreement the terms of which were not expressed in detail; and therefore the offer and acceptance, without more, did not constitute a contract for the sale of the mining claim.

*Winn v. Bull* (1877), 7 Ch.D. 29, *Chinnock v. Marchioness of Ely* (1865), 4 De G.J. & S. 638, and *Rossiter v. Miller* (1878), 3 App. Cas. 1124, followed. Judgment of LATCHFORD, J., affirmed. *Stow v. Currie*, 486.

2. *Sale of Interests in Railway Systems—Time Deemed to be of Essence—Failure of Purchaser to Make Payment on Day Appointed—Vendor not in Default—Notice Repudiating Contract—Damages for Breach—Deposit—Retention by Vendor—Forfeiture—Relief against—Delay in Bringing Action.*—The plaintiff's claim was for damages for breach by the defendant of an agreement made on the 22nd January, 1902, between M. and the defendant, and for repayment by the defendant of a

sum of \$250,000. The plaintiff, by his statement of claim, after setting out the instruments constituting the contract, which shewed that it was to be fully performed on both sides on or before the 1st June, 1902, alleged that the defendant carried out no part of his obligations under it, but made default in the same; and on the 3rd June, 1902, by letter addressed to M. and one W., the defendant formally repudiated the contract; and that all the rights of M. and W. had been duly assigned to the plaintiff, of which express notice in writing had been given to the defendant. The action was commenced on the 26th February, 1907. By an instrument dated the 28th April, 1902, M. assigned all his interest in the contract to W., who, by an instrument dated the 10th January, 1907, after first declaring therein that he wholly abandoned any right, title, and interest which he had in the contract, purported to relinquish, assign, and transfer all his rights to the plaintiff. The contract was with reference to the acquisition by M. and W. of the defendant's interests in two Canadian railway systems, M. and W. paying therefor \$10,000,000. These interests were largely in the shape of shares in the capital stock and bonds of the railway companies. Although the notice of the 3rd June, 1902, was received by M. and W., and the plaintiff was aware of it, there was no protest from any of them, nor any expression of readiness, willingness, or anxiety to perform the contract on their part, nor any steps indicating an intention or desire to have it performed, so far as the defendant was aware, until the commencement of the action. The sum of \$250,000 was



paid by M. and W. to the defendant as security for the due carrying out of the agreement, and it was agreed that in the event of any default being made in the payment of the money under the terms of the agreement, on the 1st June, 1902, or sooner, the \$250,000 should be forfeited and remain the defendant's absolute property as liquidated damages for such default:—

*Held*, upon the evidence, that M. and those interested with him in the contract were responsible for the failure to complete on the day named in the contract, and the plaintiff was not entitled to damages, and the defendant was entitled to retain the \$250,000.

Judgment of MABEE, J., affirmed.

*Per* Moss, C.J.O., that the case was one in which, even in equity, time would be deemed to be of the essence, and the circumstances shewed that the parties so regarded it. On the 3rd June, 1902, when the defendant gave the notice, the contract was at an end, and the notice could give no right of action; the plaintiff could not maintain that the defendant, while the contract was on foot, repudiated it so as to give the plaintiff the right to treat it as at an end and sue for damages. Supposing the plaintiff entitled to recover if he could prove his readiness and willingness to complete within a reasonable time after the stipulated day, he had wholly failed to prove his readiness and willingness. No action for damages could be maintained, because there was no actionable breach by the defendant. And, if the plaintiff had sought specific performance or in the alternative damages, and failed, as he must have failed, as to specific perform-

ance, he would also fail as to damages. The conditions of the agreement as to the \$250,000 were substantially the same as the law attaches to a deposit made on a contract of sale and purchase; and there was nothing in this case to take it out of the ordinary rule that, if the contract be performed, the money is brought into account as part payment of the purchase-money, but, if the purchaser makes default, it may be retained. That was the contract of the parties; and there was no ground for relief against the forfeiture, if it could be treated as one; the delay alone would be a serious obstacle in the way of that relief.

*Per* MEREDITH, J.A., that there was a substantial failure of the purchaser to carry out the transaction on his part; in the terms of the agreement between the parties, the \$250,000 became the property of the vendor; and there was nothing in law or equity preventing the words which the parties employed being given effect to. *Sprague v. Booth*, 637.

*See* BANKS AND BANKING—COMPANY—CONSTITUTIONAL LAW—HUSBAND AND WIFE, 2—INSURANCE—LANDLORD AND TENANT, 1—PLEADING, 2—RAILWAY—VENDOR AND PURCHASER.

---

### CONTRIBUTORY.

*See* COMPANY, 1.

---

### CONTRIBUTORY NEGLIGENCE.

*See* STREET RAILWAYS, 3—WAY.

---

### CONVERSION.

*See* DAMAGES.



**CONVICTION.**

See CRIMINAL LAW—LIQUOR LICENSE ACT, 2, 3, 4.

**CORROBORATION.**

See CRIMINAL LAW, 2—GIFT.

**COSTS.**

See COMPANY, 5—GIFT—HIGHWAY—INFANT—LIQUOR LICENSE ACT, 2, 3—MUNICIPAL CORPORATIONS, 3—PUBLIC SCHOOLS—SOLICITOR.

**COUNTERCLAIM.**

See COMPANY, 7—PLEADING, 1.

**COUNTY COUNCIL.**

See MUNICIPAL CORPORATIONS, 7.

**COUNTY COURT JUDGE.**

See LIQUOR LICENSE ACT, 4—MUNICIPAL CORPORATIONS, 2, 6, 7.

**COURTS.**

See DIVISION COURTS—LIQUOR LICENSE ACT, 3.

**CRIMINAL LAW.**

1. *Abduction of Young Girl—Criminal Code, sec. 315—Conviction—Evidence—Leave to Appeal.*—An application by the prisoner for leave to appeal from a conviction for unlawfully taking an unmarried girl under the age of sixteen out of the possession and against the will of her mother, then having the lawful care and charge of her, contrary to sec. 315 of the Criminal Code, was refused, there being evidence to sustain the conviction, and the object or intention with which the girl was taken being immaterial. *Rex v. Yorkema*, 193.

2. *Evidence—Accomplice—Corroboration—Jury.*—An accom-

plice is a competent witness, and a conviction may be had on his uncorroborated evidence, if credit be given to it.

Where the trial is by jury, the Court should call the attention of the jury to the character of the witness as an accomplice and the reasons why care should be taken in accepting the wholly unsupported evidence of such a witness; but the Court has no power to require the jury to reject such evidence.

In this case there was no jury, and it was *held*, that the trial Judge, who was familiar with the common objections to the evidence of accomplices, had power to convict the accused upon the uncorroborated evidence of an accomplice.

*Regina v. Beckwith* (1859), 8 C.P. 274, *In re Meunier*, [1894] 2 Q.B. 415, *The King v. Tate*, [1908] 2 K.B. 680, and *The King v. Warren* (1909), 2 Cr. App. R. 194, 25 Times L.R. 633, discussed. *Rex v. Frank*, 196.

3. *Theft—Jurisdiction of Police Magistrate for City—Summary Trial—Criminal Code, secs. 782, 783—Conviction—Warrant of Commitment—Defects—Habeas Corpus—Remand upon Substituted Warrant—Appeal—Certiorari Granted to Crown—Return of Proceedings at Trial—Election of Prisoner—Right of Re-election—Refusal of Postponement—Sentence—Imprisonment in Central Prison—Hard Labour.*—Where the warrant of commitment under which a prisoner is detained is defective, the Judge hearing an application for discharge, on the return of a *habeas corpus*, may remand the prisoner to custody under a substituted warrant. The provisions of the Criminal Code respecting

Extraordinary Remedies, secs. 1120 to 1132, have taken the sting out of technical objections based upon defects in warrants of commitment.

Where the prisoner obtains a writ of *habeas corpus*, the Crown may have the proceedings brought up on *certiorari*; nothing in the powers conferred by the 5th section of the provincial Habeas Corpus Act lessens the right to such a writ.

The proceedings being removed, the evidence shewed that the prisoner elected summary trial, and that he did not need a postponement of the trial to obtain witnesses; so that objections based on an affidavit of the prisoner, to the effect that he did not really elect summary trial, and that he was denied an opportunity of making his full answer and defence, could not prevail.

Where a prisoner has elected summary trial, he has no legal right to re-elect.

The sentence being imprisonment in the Central Prison, the prisoner was subject to all the rules, regulations, and discipline of that prison during his term: R.S.C. 1906, ch. 148, secs. 46, 47; R.S.O. 1897, ch. 308, sec. 30; and therefore the fact that the words "at hard labour" were stricken out of the conviction could have no substantial effect.

The prisoner was summarily tried by the police magistrate for a city upon a charge that he did assault and unlawfully take, steal, and carry away from the person of W. a sum of money, etc., and was convicted:—

*Held*, that the magistrate had jurisdiction: secs. 782 and 783 of the Criminal Code (the requirements of which were admittedly

not observed) have no application to a trial by such a magistrate.

*Semble*, having regard to secs. 446 and 852 of the Criminal Code, that the offence was robbery, not merely theft; the evidence was of theft with very considerable violence. *Rex v. Macdonald*, 38.

4. *Theft of Fowl—No Evidence of Value—Speedy Trial—Criminal Code, sec. 370—Conviction—Sentence—Excessive Term of Imprisonment—Discharge of Prisoner—Criminal Code, secs. 1016, 1018.*—The prisoner, having elected speedy trial without a jury, was brought before a County Court Judge's Criminal Court, and pleaded guilty to each of three separate charges of theft, at different times, of turkeys and chickens belonging to different owners. The value of the stolen property was not stated in any of the cases. The prisoner was convicted and sentenced on each charge to three years' imprisonment, the terms to run concurrently:—

*Held*, that there was no power to impose upon the prisoner the sentence of three years' imprisonment.

Reference to secs. 10, 370, 386, 582, 824, 825, 1051, and 1056 of the Criminal Code.

Upon the hearing of a reserved case, the Court of Appeal, instead of fixing a shorter period of imprisonment, or otherwise varying the sentence, directed that the prisoner should be discharged.

Reference to secs. 1016 and 1018 of the Criminal Code. *Rex v. Williams*, 467.

*See LIQUOR LICENSE ACT.*

## CROWN.

*See CRIMINAL LAW, 3—MUNICIPAL CORPORATIONS, 8.*

**CRUELTY.**

See HUSBAND AND WIFE, 1.

**DAMAGES.**

*Sale and Conversion of Unlisted Shares—Measure of Damages—Evidence as to Value—Price Actually Realised—Price Realised by Others—Exceptional Circumstances—Estimate by Court Acting as Jury.*—The damages for the sale and conversion by the defendant of 20,000 shares of the capital stock of a mining company, unlisted and having no market value, to which the plaintiff was entitled under a contract with the defendant, were assessed by a Referee upon a reference at 40 cents a share, which was the highest price at which shares of the company had been sold. It appeared that the circumstances in regard to that sale were exceptional. Upon the defendant's appeal to a Judge, the damages were reduced to 26 cents a share, the price obtained by the defendant. Upon the plaintiff's appeal to a Divisional Court, the damages as reduced by the Judge were increased by the sum of \$1,500; the Court holding that it should act as a jury, and assess the damages at a fair sum, taking into consideration the fact of a sale at a higher price than that obtained by the defendant.

*Per CLUTE, J.*—The plaintiff never recognised the sale by the defendant, and only consented to take damages in lieu of the shares because, the shares being sold, he had no other remedy. The shares on the day the action was brought had no market value; and a jury would have to say what was a reasonable compensation for the loss of the shares.

*In re Bahia and San Francisco*

*R.W. Co.* (1868), L.R. 3 Q.B. 584, followed.

*Michael v. Hart*, [1901] 2 K.B. 867, [1902] 1 K.B. 482, discussed.

*Per MIDDLETON, J.*—The defendant cannot escape liability beyond the amount received by him in a case of this kind, merely because he acted in good faith so far as the sale was concerned. Nor should he be held to account for the full price realised by another in exceptional circumstances. The value of the shares was left in doubt; and the Court should, as a jury, make a fair assessment.

Order of MEREDITH, C.J.C.P., varied. *Goodall v. Clarke*, 614.

See COMPANY, 7—CONTRACT, 2—LANDLORD AND TENANT, 1, 3.

**DEATH.**

See EVIDENCE—GIFT—INSURANCE—WILL, 2.

**DEDICATION.**

See WAY.

**DEFAMATION.**

*Libel—Discovery—Person Liable not Named—Examination of Defendant—Questions as to Person Intended—Privilege—Malice.*—In an action for a libel said to be contained in a letter written by the defendant to the husband of the plaintiff, the defendant, on being examined for discovery, admitted the authorship of the letter, but refused to answer questions directed to finding out who the person referred to in the letter as "lady friend" was—the plaintiff not being named in the letter. The defendant in his statement of defence denied all the allegations of the statement of claim, and said that, if the words were written and published of and



concerning the plaintiff, as alleged, it was without malice and upon a privileged occasion:—

*Held*, that the defendant should answer the questions; the alleged libel having made a reference that could only be understood having regard to extraneous circumstances, the questions were relevant to shew that the plaintiff was the person who would be understood by her associates or persons acquainted with the circumstances, to have been referred to; and the questions were also relevant upon the issue as to malice raised by the defence of privilege.

Order of SUTHERLAND, J., affirmed. *Morley v. Patrick*, 240.

See LIQUOR LICENSE ACT, 1.

### DEPOSIT.

See CONTRACT, 2.

### DEPOSITIONS.

See EVIDENCE.

### DEVOLUTION OF ESTATES ACT.

*Land Vesting in Heir without Conveyance under sec. 13—Liability for Debts—Action by Judgment Creditor against Heirs—2 Edw. VII. ch. 1, sec. 4—Repeal of 3 W. & M. ch. 14—Bar by Statute of Limitations—Possession under Parol Gift—Acts of Ownership.*—Where there has been a conveyance of land of a deceased person by the executor or administrator, the heir or devisee is free from an action by a creditor of the deceased. Where there has not been a conveyance, but the land has become vested in the heir or devisee under sec. 13 of the Devolution of Estates Act, the land is liable to answer the debts of the deceased person: 2 Edw. VII.

ch. 1, sec. 4, and ch. 17, amending the principal Act.

N. H. died on the 24th May, 1899, intestate. Under sec. 13, her land became vested in her heirs on the 24th May, 1900, at which date the statute 3 W. & M. ch. 14 was in force. The statute 2 Edw. VII. ch. 1, by sec. 2, repealed, so far as in force in Ontario, 3 W. & M. ch. 14:—

*Quere*, whether the words of sec. 4 of 2 Edw. VII. ch. 1, “shall become vested,” applied to land which had become vested before that Act was passed, and, if not, what was the effect of the repeal of 3 W. & M. ch. 14?

An action was brought by a judgment creditor of N. H., against her heirs-at-law, for a declaration that the plaintiff’s debt was a charge upon certain land of which she was alleged to be the owner in fee at the time of her death, and for a sale of the land, etc. The plaintiff did not sue as an execution creditor, nor on behalf of all creditors, and did not ask for administration:—

*Held*, that the action lay.

*Held*, however, upon the evidence, that one of the defendants had, by virtue of a parol gift from N. H., and length of possession, acquired a title to the land under the Statute of Limitations; and upon that ground the action failed.

Acts of ownership depend upon the circumstances, the conditions, and the kind of land. In this case it was bush land, and there was evidence of fencing and payment of taxes. *Beer v. Williams*, 49.

### DIRECTORS.

See BANKS AND BANKING, 1, 2—COMPANY.



**DISCOVERY.***See* DEFAMATION—EVIDENCE.**DISTRESS.***See* LANDLORD AND TENANT, 3.**DIVISION COURTS.**

*Jurisdiction—Claim over \$100—Division Courts Act, secs. 72, 72 a—Promissory Note—Production and Proof of Signature—Investigation of Larger Account—Matters of Defence.*]—Under sec. 72, sub-sec. 1 (*d*), of the Division Courts Act, R.S.O. 1897, ch. 60, and sec. 72a (added by 4 Edw. VII. ch. 12, sec. 1), a Division Court has jurisdiction to entertain a claim upon a promissory note for over \$100, but not exceeding \$200; all that is necessary to make out the plaintiff's case being the production of the note and proof of the signature of the defendant; and the jurisdiction is not ousted because it appears that there were other dealings between the parties, and that the note is an item of an account which the plaintiff kept against the defendant and another, secured by a mortgage, even if it is necessary to investigate the account for the purpose of ascertaining whether the promissory note has been paid in whole or part. *Re Green v. Crawford*, 36.

**DIVISIONAL COURT.***See* LIQUOR LICENSE ACT, 3.**DOMESTIC TRIBUNALS.***See* BENEFIT SOCIETY.**EASEMENT.**

*Conveyance of Lots according to Registered Plan—Park Reserve and Entrance Marked on Plan—Registry Laws—Statute of Limitations.*]—*Held*, affirming the judgment of

a Divisional Court, 19 O.L.R. 471, in the circumstances there stated, that what the plaintiff claimed and was entitled to was an easement, and that the defendant's possession was insufficient to bar the plaintiff.

*Mykel v. Doyle* (1880), 45 U.C.R. 65, approved and followed.

*Per* GARROW, J.A., that, even if the conveyance to the defendant had actually been of the land which she claimed to have purchased, she must have taken subject to the rights of prior and subsequent purchasers of lots laid out on the plan, such rights resting upon and being protected by the prior registration of the plan, of which every one subsequently dealing with the land was bound to take notice; and such rights were in the nature of easements.

*Per* MEREDITH, J.A., that the whole difficulty had arisen through a mistake of fact as to the actual position on the ground of the reservations, a mistake made when the defendant first acquired an interest in the land, and not attributable to the plaintiff; what the parties were bargaining about was land abutting on these reservations, with common rights over them, for access, etc.; and the common rights in the reservations—created, at least, when the defendant took her lease—being easements, against which the Statute of Limitations relied upon by the defendant does not run, no title by length of possession had been acquired. *Idhe v. Starr*, 407.

**ELECTION.**

*See* CRIMINAL LAW, 3—LANDLORD AND TENANT, 1.

**ELECTRIC RAILWAY COMPANY.***See* COMPANY, 2.

**ESTOPPEL.**

See MUNICIPAL CORPORATIONS,  
2—PARTNERSHIP—PLEADING, 2.

**EVICTION.**

See LANDLORD AND TENANT,  
1, 2.

**EVIDENCE.**

*Examination of Plaintiff for Discovery—Death of Plaintiff—Continuation of Action by Executor—Depositions on Examination—Inadmissibility, as Evidence for Plaintiff.*—The original plaintiff died after having been examined for discovery in the action, and the action was continued by her executor by virtue of an order obtained for that purpose:—

*Held*, that the depositions of the original plaintiff upon her examination could not be read as evidence to prove the plaintiff's case: for (1) the evidence could not be used at any stage of the action against the defendant upon any proceeding in the lifetime of the witness; (2) an examination for discovery is not an affidavit, so that Con. Rule 483 can apply; and (3) the Rules provide for the use in evidence of the examination for discovery of the opposite party, and *expressio unius est exclusio alterius*.

The application for leave to read the depositions should have been made before the trial, and was treated as if so made, though in fact made at the trial. *Johnson v. Birkett*, 319.

See BANKS AND BANKING, 2—CRIMINAL LAW, 1, 2, 4—GIFT—HUSBAND AND WIFE, 2—INSURANCE, 1, 2—LIQUOR LICENSE ACT, 4—MALICIOUS PROSECUTION—NEGLIGENCE, 1—WILL, 1.

**EXAMINATION OF PARTIES.**

See DEFAMATION—EVIDENCE.

**EXCESS OF JURISDICTION.**

See LIQUOR LICENSE ACT, 1.

**EXCESSIVE DISTRESS.**

See LANDLORD AND TENANT, 3.

**EXECUTION.**

*Interests under "Oil Leases"—Goods or Lands.*—The interests of the defendants under certain "oil leases," in substantially the same form as the instrument the effect of which was considered in *McIntosh v. Leckie* (1906), 13 O.L.R. 54, were *held*, following the decision in that case, to be interests in land, and not liable to seizure under execution as goods. *Canadian Railway Accident Co. v. Williams*, 472.

See COMPANY, 7.

**EXECUTORS AND ADMINISTRATORS.**

See EVIDENCE—GIFT.

**EXEMPTION.**

See RAILWAY, 2.

**EXPRESS COMPANY.**

See RAILWAY, 2.

**FOREIGN LAW.**

See HUSBAND AND WIFE, 2.

**FORFEITURE.**

See CONTRACT, 2.

**FRAUD AND REPRESENTATION.**

See BENEFIT SOCIETY—COMPANY, 1, 5—PLEADING, 2.

**GAS COMPANY.**

See HIGHWAY.

**GIFT.**

*Money in Bank—Transfer to Joint Credit of Donor and Daughter—Death of Donor—Right of Survivor—Claim of Executor—Interpleader Issue—Evidence—Corroboration—R.S.O. 1897, ch. 73, sec. 10—Costs.*—J. S. and his wife had money deposited in a bank to their joint credit. The wife died; and thereafter J. S. delivered to the bank a written memorandum, addressed to the bank, and signed by himself, as follows: "This is to certify that I transfer this money in my name J. S. and M. S. in our savings bank account number S. 27 in your bank to the joint credit of myself, the sole survivor, and my daughter M. S., to be drawn by either of us." The money lay wholly undisturbed in the bank until the death of J. S., when it was claimed by the plaintiff, one of the executors of J. S., as part of his estate, and by the defendant, the daughter named in the memorandum, as her own:—

*Held*, that the defendant's story, that her father intended that the money should be at the call of either her or himself, and that, if any were left at his death, she should have it all, was corroborated by the document so as to satisfy the requirements of R.S.O. 1897, ch. 73, sec. 10, and should be accepted, as against the evidence of the plaintiff and another witness.

And *held*, notwithstanding the general rule that a parol gift of a chattel without delivery is ineffective, that, in the circumstances, the money was during the joint lives joint property with right of survivorship.

*Re Ryan* (1900), 32 O.R. 224, and cases there cited, followed.

*Talbot v. Cody* (1875), 10 Ir. R.Eq. 138, specially referred to.

*Hill v. Hill* (1904), 8 O.L.R. 710, distinguished.

Interpleader issue found in the defendant's favour; the plaintiff to pay the defendant's costs; those costs and his own costs not to come out of the estate in such a manner as that the defendant would be in fact paying part of them herself (subject nevertheless to the discretion of the Surrogate Judge, when passing the plaintiff's accounts, to allow these costs out of the remainder of the estate.) *Schwent v. Roetter*, 112.

See DEVOLUTION OF ESTATES ACT—INSURANCE, 1—WILL.

**GOOD FRIDAY.**

See MUNICIPAL CORPORATIONS, 5.

**HABEAS CORPUS.**

See CRIMINAL LAW, 3—LIQUOR LICENSE ACT, 2, 3.

**HIGHWAY.**

*Obstruction at Side of Road—Injury to Travellers—Condition of Highway—Negligence—Cause of Injury—Overcrowded Vehicle—Municipal Corporations—Gas Company—Costs.*—The plaintiffs on a dark night were driving in an overcrowded buggy upon a township line highway—the centre part, designed for vehicles, being in good repair—when the buggy upset upon the edge of the ditch at the side of the central travelled roadway, and the plaintiffs were thrown against some hard substance—they said, iron piping left uncovered by the defendant gas company upon the highway, beyond the ditch and next to the fence, on the part designed for pedestrians—and injured:—



*Held*, assuming that the plaintiffs were thrown against the piping—and that, though not the cause of the injury, occasioned its serious extent—that the proximate cause was the upset of the buggy, which was facilitated at least by its overcrowded and top-heavy condition; that the plaintiffs were not exercising reasonable care; and, although the piping was an obstruction upon the pedestrian part of the way, it could not be said that the municipalities failed to exercise proper care for the safety of travellers upon the central part by permitting it to lie there uncovered.

The action was dismissed as against all the defendants without costs, the uncovered condition of the piping being considered in dealing with the costs. *Everitt v. Township of Raleigh*, 91.

See TRIAL—WAY.

### HOLDING OUT.

See PARTNERSHIP.

### HOLDING OVER.

See LANDLORD AND TENANT, 3

### HOLIDAY.

See MUNICIPAL CORPORATIONS, 5.

### HUSBAND AND WIFE.

1. *Alimony — Cruelty—Refusal to Supply Clothing—Wife Living in Husband's House—Remedy.*—In an action for alimony, the plaintiff charged the defendant with cruelty. She was called as a witness at the trial, and it appeared that she was living under her husband's roof, though not occupying the same bed, and was supplied with food. She did not desire resumption of marital intercourse, but did want more than

just her living; and the Court was asked to make an order that the defendant should pay her so much a month or so much a week, she living all the time under his roof, as she had no means of clothing herself, and the defendant had notified the tradesmen in the town where they lived not to supply her with clothing. Upon these facts appearing, and the nature of the claim being explained, the trial Judge refused to go on with the inquiry as to the alleged previous cruelty, etc.:—

*Held*, that, in such circumstances, the wife was not entitled to alimony.

The law, so long as a wife remains in her husband's house, enables her to enforce the marital obligation to supply her with clothing, only by a circuitous route, by pledging the credit of her husband for necessities. *Price v. Price*, 454.

2. *Ante-nuptial Contract — Sum Payable to Wife at Death of Husband—Onerous Contract—Law of Province of Quebec—Proof of—Evidence of Advocates—Conflict—Examination by Court of Authorities—Finding on Disputed Question.*—The plaintiff, being about to be married to a man resident and domiciled in the Province of Quebec, in 1889, in that Province, entered into a marriage contract with him, whereby, “in the future view of the said intended marriage, he . . . for and in consideration of the love and affection and esteem which he hath for and beareth to the” plaintiff, “hath given, granted, and confirmed, and by these presents doth give, grant, and confirm, unto the” plaintiff, “accepting hereof . . . the sum of \$25,000 . . . payable unto the” plaintiff “by the heirs, executors, administrators, or as-



signs of him . . . the payment whereof shall become due and demandable after the death of him . . .” In the contract the plaintiff renounced community, dower, and right of dower, and agreed that she and her husband should each be separated from the other as to property. The marriage took place. The husband was at that time insolvent, but the plaintiff was not aware of it. The husband died in 1907, leaving an estate, but not sufficient to pay all his creditors in full, if the plaintiff was entitled to rank as a creditor of the estate for the \$25,000 mentioned in the contract:—

*Held*, that the question of the right of the widow to rank must be determined by the law of Quebec; what that law is falls to be determined upon the testimony of persons skilled in it, but, where their evidence is conflicting and for that reason unsatisfactory to the determining tribunal, it may examine for itself the decisions of the foreign Courts and the statements of the text writers in order to arrive at a conclusion upon the question of the foreign law.

And *held*, upon the evidence and examination of the provisions of the Civil Code of Quebec and authorities cited, that the contract was an onerous one, and not gratuitous, and the plaintiff was entitled to rank as a creditor; MEREDITH, J.A., dissenting.

Judgments of BRITTON, J., and a Divisional Court, affirmed. *O'Reilly v. O'Reilly*, 201.

## HYDRO-ELECTRIC POWER COMMISSION.

*See* CONSTITUTIONAL LAW.

## IMPRISONMENT.

*See* CRIMINAL LAW, 3, 4 —  
LIQUOR LICENSE ACT, 3.

## IMPROVEMENTS.

*See* LANDLORD AND TENANT, 1.

## INDEMNITY.

*See* BANKS AND BANKING, 2—  
RAILWAY, 2, 4.

## INDEPENDENT CONTRACTOR.

*See* NEGLIGENCE, 1.

## INFANT.

*Next Friend—Settlement of Action—Payment of Sum to Solicitors—Neglect to Obtain Approval of Court—Retention by Solicitor of Part for Costs—Payment to Next Friend—Ratification of Settlement by Plaintiff at Majority—Payment into Court—Con. Rule 840—Delivery and Taxation of Bill—Interest—Costs.*—An action having been brought on behalf of an infant as plaintiff, by a next friend, to recover damages for injuries sustained by the infant, a settlement was (after the action had been set down for trial) effected between the solicitors, under which the defendants paid to the plaintiff's solicitors \$800 “in full of claim and costs.” Neither party obtained the consent and approval of the Court. No part of the money was paid into Court, as required by Con. Rule 840. The plaintiff's solicitors paid \$200 to the next friend “for his services,” and retained \$300 for their costs. When the plaintiff became of age, he affirmed the settlement:—

*Held*, that the next friend is an officer of the Court and amenable to the order of the Court; and his conduct in receiving the \$200 and that of the solicitors (also officers of Court) in paying it,

could not be justified; both the next friend and solicitors were liable for it; and they were ordered to pay it into Court, with interest.

Consideration of the position and powers of a next friend.

While a next friend is in the same position as a trustee in some respects, the statute giving compensation to trustees, R.S.O. 1897, ch. 129, sec. 40, does not cover his case, and he is not entitled to compensation or remuneration; though he stands in the same position as a trustee in respect of costs, charges, and expenses properly incurred before the action was brought.

*Held*, also, that the solicitors were not entitled to retain the \$300 for costs; and they were ordered to render a bill of costs and charges and pay \$200 and interest into Court; the bill rendered to be taxed, and the plaintiff to be at liberty to contend that no costs were payable; the taxing officer to certify by how much the amount of costs, etc., properly chargeable, was more or less than \$100; if the amount should be more than \$100, the excess without interest to be payable to the solicitors out of Court; if the amount should be less than \$100, the balance with interest to be paid into Court by the solicitors.

*Held*, also, that the solicitors might include in their bill any costs, charges, and expenses properly incurred by the next friend as above; and the next friend should have an opportunity to establish by action his claim to remuneration; the \$200 to remain in Court subject to further order.

The plaintiff having brought an action in a County Court to re-

cover the \$500, but having elected to have his remedy by an order in the High Court in the original action:—

*Semble*, that the defendants in the County Court action might plead this election under Con. Rule 289, *puis darrein continuance*; and the plaintiff would then be entitled to his costs under Con. Rule 295, unless the Court should otherwise order.

The solicitors were ordered to pay the costs of all parties (except the defendants in the original action) of the motion upon which the order for payment into Court, delivery of bill, etc., was made, the whole trouble having arisen from their neglect to have the compromise approved by the Court and their own costs fixed or taxed, and by their disobedience to Con. Rule 840. The defendants were allowed no costs, as they should have seen that the settlement was approved by the Court. *Vano v. Canadian Coloured Cotton Mills Co.*, 144.

See LIQUOR LICENSE ACT, 4.

## INSURANCE.

1. *Life Insurance—Assignment of Policy to Stranger—Gift—Delivery—Intention—Evidence—Revocation—R.S.O. 1897, ch. 203, sec. 151—Construction of Assignment—Designation of Beneficiary.*—The plaintiff, in December, 1896, signed a document (not under seal) by which he purported to assign to the defendant a certain twenty-year endowment policy of insurance on his life, effected in 1888, by which the insurance company promised, in consideration of an annual premium of \$256.50, to pay at the death of the plaintiff, or at the maturity of the policy in 1908, the sum of \$5,000. The assignment stated

that "for one dollar" and "for other valuable considerations," the plaintiff assigned, transferred, and set over to the defendant (naming her and describing her as "*fiancée*") all his right, title, and interest in the policy (describing it), "and, for the consideration above expressed, I do also, for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators, and assigns, and their title to the said policy will forever warrant and defend." There was in fact no consideration for the assignment. The plaintiff did not, at the time he executed it, inform the defendant of it; but in February, 1897, he mentioned it in a letter to her; and in March he sent the assignment to the insurance company, and they registered it in their books, and notified the defendant of it. In April the plaintiff wrote to the defendant saying that he enclosed her the assignment, and telling her not to lose it, but he did not in fact enclose it, and she never had the policy or the assignment in her possession. The plaintiff paid the premiums and kept the policy on foot. In January, 1909, he executed a document purporting to revoke the assignment, and brought this action for a declaration that the assignment was duly revoked and that he was entitled to the insurance moneys, the policy having matured:—

*Held*, that, even if evidence of the plaintiff's intention was admissible (and, *semble*, it was not), there was nothing in the evidence to warrant a finding that it was not the intention of the plaintiff to give the policy absolutely and irrevocably to the defendant, nor

that it was his intention to make the policy payable to her at his death, should that occur before maturity of the policy, and subject to any change he might desire to make before death or maturity. When the assignment was transmitted to the insurance company and the defendant notified of the transfer of the policy to her, she was, to all intents and purposes, owner of the policy. Delivery was not necessary, but, if it were, there was a constructive delivery by the formal acts of registration with the insurance company and notice to the defendant.

*Held*, also, that the assignment did not operate merely as a designation of a beneficiary, under the Ontario Insurance Act, R.S.O. 1897, ch. 203, sec. 151, which the plaintiff would have a right to change, but was an absolute, irrevocable assignment outside of the statute.

Judgment of BRITTON, J., reversed. *Wilson v. Hicks*, 623.

2. *Life Insurance—Presumption of Death of Insured—Evidence—Proofs of Death—Insufficiency—Return of Premiums Paid after Supposed Death—Voluntary Payments.*—In an action upon two policies of insurance on the life of S., the plaintiff, his wife or widow, alleged that he died before the action was commenced and within a year after the 20th December, 1897, when he was last heard from; and she also claimed a return of the premiums paid by her upon the policies since the 20th December, 1898. Under each policy the insurance money was payable "within ninety days after due notice and proof of the death;" and by the Ontario Insurance Act, R.S.O. 1897, ch. 203,



sec. 80, insurance moneys are payable in sixty days after "reasonably sufficient proof." There was no direct evidence of the death, but the plaintiff rested upon the presumption arising from the fact that S. had not been heard of since the 20th December, 1897.

S. left his home in Toronto in November, 1897, and went to Chicago, with a view of seeking employment. During the six or seven weeks next after his departure he wrote three letters to his wife. In the last, dated the 20th December, 1897, written at Chicago, he stated that he was leaving there. Then all communications ceased, and since then nothing had been heard from or of him by the plaintiff or any of his family, who took no steps to trace him or ascertain whether he was living or not.

In December, 1906, the plaintiff first made claim for the insurance money, and forwarded to the defendants proofs of loss, which consisted of her own statutory declaration setting out the above facts, exhibiting copies of the three letters, and stating her belief that if he were living he would have continued to correspond with her. There was no proof of search or inquiry.

The action was begun on the 23rd March, 1907. After the action had begun the defendants advertised and made inquiries for S., but without success:—

*Held*, upon the evidence given at the trial, and especially considering the efforts made by the defendants, that S. should be presumed to be dead before the 13th May, 1908; the probability of his sending intelligence of himself was not rebutted by anything in the evidence so as to prevent the presumption of his death arising.

But *held*, that the defendants had not received reasonably sufficient proof thereof before action, and upon that ground the action failed, and should be dismissed, but without prejudice to another action.

*Held*, as to the claim for return of the premiums, that no presumption arose as to that, and the plaintiff had not established that the death took place before the date of payment of any of the premiums accruing before action; and they were not paid negligently or under mistake, but voluntarily, with full knowledge of the doubt as to their being payable at all. *Somerville v. Aetna Life Insurance Co. of Hartford*, 276.

See BENEFIT SOCIETY.

## INTEREST.

See INFANT—LANDLORD AND TENANT, 1.

## INTEREST IN LAND.

See EXECUTION.

## INTERLINEATIONS.

See LIQUOR LICENSE ACT, 3.

## INTERPLEADER.

See GIFT.

## INTERPRETATION ACT.

See BANKS AND BANKING, 1—MUNICIPAL CORPORATIONS, 4.

## INTOXICATING LIQUORS.

See LIQUOR LICENSE ACT—MUNICIPAL CORPORATIONS, 1-6.

## JUDGMENT.

See COMPANY, 3, 5, 7.



**JURISDICTION.**

*See* BENEFIT SOCIETY—CRIMINAL LAW, 3—DIVISION COURTS—LIQUOR LICENSE ACT, 1, 2, 3.

**JURY.**

*See* CRIMINAL LAW, 2—DAMAGES—MALICIOUS PROSECUTION—NEGLIGENCE, 1—STREET RAILWAYS, 1, 2, 3—WAY.

**JURY NOTICE.**

*See* TRIAL.

**JUSTICES OF THE PEACE.**

*See* LIQUOR LICENSE ACT, 2, 3.

**LACHES.**

*See* COMPANY, 5—CONTRACT, 2.

**LANDLORD AND TENANT.**

1. *Lease—Repudiation by Tenant—Reletting—Eviction—Right to Rent Accrued—Interest—Election to Treat Contract as Terminated—Damages—Computation—Rent—Taxes—Improvements.*]—The plaintiffs on the 29th February, 1908, made a lease to the defendant of store property in a city for a term of ten years from the 5th March, 1910, at a yearly rent of \$3,000, payable in equal parts, on the 5th day of each month, in advance, during each year of the term. The defendant covenanted to pay rent and taxes, to leave in repair, and to add certain improvements. The defendant was offered possession, but refused to take it. After some negotiation, he repudiated the lease and refused to act under it. The plaintiffs, after doing their best to make the defendant go in under the lease, advertised the property for rent, and on the 22nd April, 1910, leased it for five years to N., on

terms less favourable to them as landlords than those contained in the defendant's lease. On the 7th April, 1910, immediately after the repudiation of the lease, the plaintiffs brought this action to recover two gales of rent and damages for breach of contract:—

*Held*, that the plaintiffs were entitled to the two gales of rent and interest thereon.

The act of the plaintiffs in leasing to N. could not be called an eviction; and, even were it an eviction, it would not affect the liability for rent accrued due before the eviction. Nor was this the case of the landlord taking advantage of the proviso in the lease, in the statutory form, for non-payment of rent. It was the case of one contracting party expressly repudiating to the other the contract between them, and notifying him, in unequivocal terms, that he would not be bound by it; whereupon the other was entitled to treat the contract as at an end, except for the purpose of claiming damages for the breach of it; and this even where the contract had been in part performed.

The plaintiffs, then, having elected to consider the contract at an end (except for the purpose of damages), the measure of damages was the amount by which the plaintiffs were less well off than if the contract had been performed. The damages were to be estimated under the heads of rent, taxes, and improvements.

The Court will take judicial cognisance of the facts of mathematical science; and, there being no evidence of the value of money, and the statutory rate being therefore adopted, the method to be followed in computing the dam-

ages in respect of rent up to the end of the period of N.'s lease was to determine the difference in value at the date of the judgment between the present worth of the payments under the defendant's lease and the payments under N.'s lease; and, in respect of the remainder of the period under the defendant's lease, as no evidence was given that any better terms could probably or possibly be obtained for the remaining time, it should be considered that the terms of N.'s lease were the best procurable for such remaining time; and, instead of computing the present worth of each series of payments, and deducting the present worth of the lesser from that of the greater, it would be convenient to take the loss in each month and find the present worth of these amounts.

The defendant covenanted to pay taxes, but N. did not:—

*Held*, that, although there was no covenant by the plaintiffs in the N. lease to pay taxes, the taxes were payable by the plaintiffs: R.S.O. 1897, ch. 224, sec. 26.

No evidence having been given as to whether there was any likelihood of the rate of taxation being changed, it should be assumed that the rate would remain the same throughout the period, and the present worth of the payments of taxes should be computed upon that basis.

The present worth of the improvements to be made by the defendant should also be computed. *Fitzgerald v. Mandas*, 312.

2. *Lease — Termination — Temporary Occupation — Eviction.*]—The plaintiffs, tenants of business premises under a lease for five years from the defendant, sublet to one who occupied for a year,

and, the premises becoming vacant, engaged the defendant to procure another subtenant. The defendant, wishing to repair the adjoining premises, made a temporary arrangement with R., the tenant of those premises, under which R. moved into a part of the plaintiffs' premises, for which he agreed to pay a small rent, to allow a "to let" notice to remain up, and to shew the premises to prospective subtenants. This was done without consulting the plaintiffs:—

*Held*, in an action for a declaration that the lease was determined by the acts of the defendant, that to succeed the plaintiffs must shew an eviction, and that what was done by the defendant did not amount to an eviction, especially because it was plain that the defendant did not intend to terminate the lease, or to do more than permit a temporary occupation in the interest of the plaintiffs. *Mickleborough v. Strathy*, 259.

3. *Rent — Excessive Distress*—R.S.O. 1897, ch. 342—*Nominal Damages—Substantial Damage not Shewn—Claim for Damages for Holding over—Terms of Letting.*]—The judgment of OSLER, J.A., 20 O.L.R. 442, was varied by reducing the damages awarded to the plaintiff for excessive distress from \$100 to \$5.

*Held*, that the statute R.S.O. 1897, ch. 342, is confined to irregularities or illegalities arising after the distress, and has no application to the taking of an excessive distress. In the case of an excessive distress there is a breach of the statutory duty to make a reasonable distress only, and some damage must be presumed; but nominal or "nearly nominal" damages only are allowed, unless

substantial damage is shewn. As in this case the bailiff took nominal possession only, and did not interfere with the use and enjoyment of the goods, and replevin was granted upon payment into Court of the rent due, there was nothing upon which to found an award of more than nominal damages.

The judgment of OSLER, J.A., as to the terms upon which certain rooms were held by the plaintiff, was affirmed. *Hessey v. Quinn*, 519.

See NEGLIGENCE, 2.

### LEASE.

See EXECUTION — LANDLORD AND TENANT.

### LEGAL FRAUD.

See BENEFIT SOCIETY.

### LIBEL.

See DEFAMATION—LIQUOR LICENSE ACT, 1.

### LICENSE.

See PLEADING, 2.

### LICENSE INSPECTOR.

See LIQUOR LICENSE ACT, 1, 2.

### LIEN.

See COMPANY, 5.

### LIFE INSURANCE.

See INSURANCE.

### LIMITATION OF ACTIONS.

See DEVOLUTION OF ESTATES ACT—EASEMENT.

### LIQUOR LICENSE ACT.

1. *License Inspector—Notice not to Supply Intoxicating Liquor to Named Person—Sec. 125 (1)—Information by Person not within Statute — “Brother-in-law” — De-*

*famation—Injury to Business—Liability for Innocent Act—Public Officer—Notice of Action—Excess of Jurisdiction—R.S.O. 1897, ch. 88, sec. 2.]—The defendant, the License Inspector for a county, upon the application to him of McK., who was married to the sister of the plaintiff's first wife, knowing that fact, and believing that McK. was the brother-in-law of the plaintiff, issued a notice, under sec. 125 (1) of the Liquor License Act (6 Edw. VII. ch. 7, sec. 33), to the hotel-keepers of the county, forbidding them to deliver liquor to the plaintiff. The section says that, among other persons, “the parent, brother or sister, of the husband or wife” of any person who has the habit of drinking liquor to excess, may require the Inspector to give the notice. The defendant acted in good faith and without improper motive:—*

*Held*, that McK. did not come within the statute, and had no more authority to intervene than a stranger; the effect of the unauthorised notice was to promulgate a libel, to injure the plaintiff's business, and to expose him to various disabilities and interfere with his freedom of action; the plaintiff was, therefore, entitled to recover damages from the defendant.

*Connors v. Darling* (1864), 23 U.C.R. 544, 552, followed.

*Held*, also, that the defendant, as a public officer, was entitled, under R.S.O. 1897, ch. 88, to notice of action; but, as he acted without jurisdiction or exceeded his jurisdiction, it was not necessary, under sec. 2, which was the section applicable, that the notice should contain a charge of malice and absence of reasonable and probable cause; it was sufficient



to state, as was stated in the notice served, that the act was done unlawfully.

*Moriarity v. Harris* (1905), 10 O.L.R. 610, and *Roberts v. Climie* (1881), 46 U.C.R. 264, specially referred to. *Piggott v. French*, 87.

2. *Conviction—Jurisdiction of Justices—Request of Police Magistrate not Appearing—R.S.O. 1897, ch. 87, sec. 22—Habeas Corpus—Motion for Discharge—Amendment of Conviction—Application of sec. 105 of Liquor License Act—Warrant of Commitment—Variance—Costs—Penalty—Informant—License Inspector—Return by Justices of Amended Conviction.*—The defendant was convicted by two Justices of the Peace of an offence against the Liquor License Act. The initiatory proceedings were taken before a Police Magistrate, and it did not appear upon the face of the conviction (though it was the fact) that the Justices were acting at the request of the Police Magistrate:—

*Held*, upon motion to discharge the prisoner from custody under a warrant of commitment based upon the conviction, that, having regard to the provisions of R.S.O. 1897, ch. 87, sec. 22, the conviction was bad because it did not shew the jurisdiction of the Justices; but the Court ordered that the prisoner should be further detained and the conviction amended under the Liquor License Act, sec. 105.

*Held*, also, that it was not a ground for discharge that the warrant of commitment did not conform to the conviction, in that the conviction did not state the costs and charges of conveying the defendant to gaol; the statement of the costs in the warrant was sufficient.

*Held*, also, upon an objection that the proper distribution of the penalty was not determinable upon the face of the proceedings, that it was sufficient that it appeared from the information that the informant was a license inspector, and that the conviction declared that the fine imposed should be paid and applied according to law.

Objections that the Justices, having drawn up and returned to the Clerk of the Peace an order for the payment of money, could not afterwards file any conviction with him, that no minute of such order was made before commitment, and that an amended conviction could not be put in after the enforcement of the fine and costs by imprisonment, were also overruled. *Rex v. Ackers*, 187.

3. *Appeal—Habeas Corpus—Refusal of Judge to Discharge Prisoner—Jurisdiction of Divisional Court—Substantive Application for Writ—Res Adjudicata—Successive Applications for Writ—"Action"—Consolidated Rules—Appeal to Court of Appeal—Option of Attorney-General—Appeal on Points not Raised below—Warrant of Commitment—Interlineation—Conviction for Second Offence—Authority of Magistrate Making First Conviction—Police Magistrate—Justice of the Peace—Jurisdiction—Form of Warrant—Schedule L.—Place of Conviction—"Unlawfully"—Address of Warrant—Description of Keeper of Gaol—Constables—Interlineations and Erasures in Conviction—Costs—Distress—Imprisonment—Charges for Conveying to Gaol—Amendment—Criminal Code, secs. 754, 1124—Proof of Prior Conviction—Liquor License Act, sec. 101 (1)—Amending Act—"And*



not before"—Change from Imperative to Directory—Proof by Testimony of Persons Present—Invalidity—Changing Conviction to one for First Offence.]—The defendant, being imprisoned under a conviction for an offence against the Ontario Liquor License Act, obtained a writ of *habeas corpus* (with *certiorari* in aid) and moved for an order for his discharge, which was refused by a Judge in Chambers:—

*Held*, BRITTON, J., dissenting, that a Divisional Court of the High Court had no jurisdiction to entertain an appeal from the Judge's order.

*Re Harper* (1892), 23 O.R. 63, followed.

*Rex v. Teasdale* (1910), 20 O.L.R. 382, not followed.

*Held*, also, *per* RIDDELL, J., that the Divisional Court could not entertain a substantive application for a writ of *habeas corpus*; the matter being *res adjudicata* unless and until the decision of the Judge in Chambers was got rid off; and the Divisional Court as a Divisional Court having no jurisdiction.

*Rex v. Miller* (No. 2) (1909), 19 O.L.R. 288, followed.

*Held*, also, *per* RIDDELL, J., that, though a person is limited, by reason of the appeal to the Court of Appeal given by the Habeas Corpus Act, to one *habeas corpus*, the common law right to go from Judge to Judge until either a writ is obtained or every Judge has refused, still remains.

*Taylor v. Scott* (1899), 30 O.R. 475, and *Rex v. Akers* (1910), 1 O.W. N. 672, explained.

*Held*, also, *per* RIDDELL, J., that the proceeding begun by the writ of *habeas corpus* was not an "action," within the meaning of the Consolidated Rules.

*Held*, also, *per* RIDDELL, J., that the fact that in this particular case (the conviction being under the Liquor License Act) the right of appeal was not or might not be absolute, but only at the option of the Attorney-General, did not affect the rule in *Taylor v. Scott*, *supra*.

Notwithstanding the objection to the jurisdiction of the Divisional Court, RIDDELL, J., considered the points raised by the appeal, and stated his opinion thereon, as follows:—

1. While it is the general rule that an appellant is not allowed to raise in the appellate Court anything which has not been raised below, the rule is not applied in cases affecting the liberty of the subject.

2. That the warrant of commitment was not bad because the word "liquor" was interlined in the recital of the conviction of the defendant for having "unlawfully sold *liquor* without the license," etc.

3. That the warrant of commitment sufficiently shewed the authority of the magistrate alleged to have previously convicted the defendant (the conviction under which he was imprisoned being for a second offence).

4. That, while in the conviction the magistrate was described as "the undersigned William Lawson, Police Magistrate in and for the said county of Frontenac, and one of His Majesty's Justices of the Peace for the said county of Frontenac," but, in speaking of the prior conviction, the words were "before me, the said William Lawson," it was to be taken that the prior conviction was made by Lawson, not as a Justice of the Peace, but as Police Magistrate, in

which latter capacity only he would have jurisdiction.

*Hunt qui tam v. Shaver* (1895), 22 A.R. 202, followed.

5. That the objection that the warrant did not state the place at which the conviction for the second offence took place was answered by saying that the form in schedule L. to the Liquor License Act had been followed.

6. That, although the warrant of commitment, in describing the offence in the recital of the conviction, omitted the word "unlawfully," while otherwise following the form in schedule F. (3), it was sufficient, having regard to sec. 72 of the Liquor License Act.

7. That the warrant (in the form in schedule L.) was sufficiently addressed to the keeper of the common gaol, by the description of his official character, though not by his name as an individual, to justify him in detaining the prisoner; the warrant was produced by the keeper, and the Court was not concerned about the description of the constables.

8. That the conviction was not invalidated by reason of interlineations and erasures in material parts; the conviction must be read with the interlineations and erasures as they appeared.

9. That the provision in the conviction, after the adjudication of imprisonment for three months for the offence, that the defendant should pay the costs of the complainant, and, if not paid, that the costs should be levied by distress, and, in default of sufficient distress, that the defendant should be imprisoned for fifteen days, unless the said costs and the charges of conveying the defendant to gaol

were sooner paid, was warranted by the Criminal Code, except as regards the charges of conveying the defendant to gaol; as to which charges sec. 739 of the Criminal Code (as amended by 8 & 9 Edw. VII. ch. 9) did not apply, nor sec. 89 of the Liquor License Act, nor R.S.O. 1897, ch. 90; nor could the conviction be amended under sec. 105 of the Liquor License Act (distinguishing *Rex v. Degau* (1908), 17 O.L.R. 366); but, if the conviction was in other respects good, the Court should (if it had jurisdiction) exercise the power given by secs. 1124 and 754 of the Criminal Code, and make a proper conviction.

10. That the effect of the amendment by 9 Edw. VII. ch. 82, sec. 209, of sec. 101 (1) of the Liquor License Act, striking out the words "and not before," is to make the provision directory, instead of imperative and peremptory.

11. That the prosecutor, though interested, was not an incompetent witness: *Canada Evidence Act*, R.S.C. 1906, ch. 145, sec. 3; R.S.O. 1897, ch. 73, sec. 2.

12. That the prior conviction could not be proved by persons present in Court when the alleged conviction took place; the prior conviction not being proved, the conviction for a second offence could not stand; *BRITTON, J.*, agreeing in this.

13. That the case could not be remitted under sec. 105 (3) of the Liquor License Act (9 Edw. VII. ch. 82, sec. 32), which only applies where evidence has been rejected; nor could proceedings be taken under sec. 101 (5), the previous conviction not having

been set aside; but the Court might (if it had jurisdiction) proceed under sec. 1124 of the Code, and make use of the power given under sec. 754, to make a conviction as for a first offence. *Rex v. Graves*, 329.

4. *Magistrate's Conviction for Selling Liquor to Minor*—7 *Edw. VII. ch. 46, sec. 8*—*Appeal to County Court Judge*—*Trial de Novo*—*Onus*—*Absence of Evidence that Person Apparently a Minor and as to Knowledge of Accused*—*Proof of Age*—*Effect of Magistrate Disbelieving Evidence*.]—The defendant, a licensed hotel-keeper, was convicted by a police magistrate, under 7 *Edw. VII. ch. 46, sec. 8*, introducing a new provision for sec. 78 of the Liquor License Act, R.S.O. 1897, ch. 245, for unlawfully giving, selling, or supplying intoxicating liquor to a youth who was apparently or to the knowledge of the defendant under the age of twenty-one years. The youth was before the magistrate, and testified that he was under twenty-one; there was no other evidence as to his age, and no evidence as to the knowledge of the defendant. Under sec. 118 of the Act, the defendant appealed to a County Court Judge, who made an order quashing the conviction. No fresh evidence was taken before the Judge; the written depositions taken by the magistrate were (by agreement) put in; and the Judge had not the supposed minor before him:—

*Held*, by a Divisional Court, upon a further appeal, by leave of the Attorney-General, under sec. 120 of the Act, that the conviction was properly quashed, there being no evidence before the Judge that the defendant knew that the youth was under twenty-one, and

none that he was apparently under twenty-one.

The appeal to the Judge under sec. 118 is in effect a trial upon the merits, the burden of proof is not upon the appellant, and the findings of the magistrate are irrelevant.

*Semble*, per RIDDELL, J., that the age of the supposed minor could not be proved by his own testimony; and also that the whole effect of disbelieving evidence is to wipe out the evidence; and, although the magistrate might disbelieve the evidence of the defendant that he thought the youth was twenty-one years old in appearance, he could not find that this evidence proved the opposite. *Rex v. Farrell*, 540.

See MUNICIPAL CORPORATIONS, 1-6.

#### LOCAL OPTION BY-LAW.

See MUNICIPAL CORPORATIONS, 1-6.

#### LOCK-UP, HOUSE.

See MUNICIPAL CORPORATIONS, 8.

#### MAINTENANCE OF BRIDGE.

See MUNICIPAL CORPORATIONS, 7.

#### MAINTENANCE OF LOCK-UP HOUSE.

See MUNICIPAL CORPORATIONS, 8.

#### MALICIOUS PROSECUTION.

*Reasonable and Probable Cause*—*Honest Belief*—*Reasonable Care to Ascertain Facts*—*Evidence—Questions for Judge—Improper Submission to Jury—Facts not Truly Stated to Crown Officer—Damages for Remand*.]—The effect



of the decision of the Supreme Court of Canada in *Archibald v. McLaren* (1892), 21 S.C.R. 588, upon the question of reasonable and probable cause in an action for malicious prosecution, is to overrule the decision of the majority of the Court of Appeal in *Hamilton v. Cousineau* (1892), 19 A.R. 203, and to settle the law, as far as the Courts of this Province are concerned, in accordance with the views expressed by Armour, C.J., and Street, J., in the Divisional Court, and the dissenting judgment of Burton, J.A., in the Court of Appeal, in *Hamilton v. Cousineau*. The question in that case was as to whether the defendant had exercised reasonable care to inform himself of the facts before he laid the information, and the question which it was unsuccessfully argued in *Archibald v. McLaren* should have been submitted to the jury was as to the honest belief by the defendant of the truth of the information upon which he acted in instituting criminal proceedings; but the same rule as to when it is proper to submit these questions must apply to both of them.

*Still v. Hastings* (1907), 13 O.L.R. 322, 324, followed.

*Abrath v. North Eastern R.W. Co.* (1883-6), 11 Q.B.D. 79, 440, 11 App. Cas. 247, explained as in accord with *Archibald v. McLaren*.

Where a charge of forgery was first made against the plaintiff and withdrawn, and a charge of theft then made, upon which the plaintiff was tried and acquitted:—

*Held*, in an action for malicious prosecution, upon the undisputed facts and treating every controverted matter as if it had been found against the defendants, that there was nothing in the evidence which warranted the submission

to the jury of a question as to whether M., the local agent of the defendants, who laid the informations against the plaintiff, honestly believed the plaintiff guilty of forgery and theft, or the submission of a question as to the exercise of reasonable care to ascertain the true facts. The facts and circumstances known to M. pointed to the plaintiff's guilt, and, so far as appeared, M. did not know the plaintiff even by sight, and no motive for making a false charge was suggested.

Assuming it to be true that M., in placing the facts before the Crown Attorney, previous to swearing to the information, told him that a handwriting expert was of opinion that the forged writing was the plaintiff's, whereas the expert had merely indicated some points of resemblance between the writing in the forged documents and a genuine specimen of the plaintiff's handwriting, but had declined to give an opinion—that had no bearing on the issue as to reasonable and probable cause.

*Held*, also, in the circumstances, that the plaintiff was not entitled to damages for his remand on the charge of forgery; although the prosecution was not discontinued when the expert gave an opinion, as he afterwards did, that the forged documents were not in the handwriting of the plaintiff, there was nothing to shew when that opinion was given, further than that it was before the 2nd October, when the charge of forgery was withdrawn.

*Fancourt v. Heaven* (1909), 18 O.L.R. 492, distinguished.

*Held*, therefore, that it should have been ruled at the trial that the plaintiff had failed to establish want of reasonable and probable



cause; and the action was dismissed.

Judgment of *MULOCK, C.J. Ex.D., reversed. Ford v. Canadian Express Co., 585.*

### **MARRIAGE CONTRACT.**

*See* HUSBAND AND WIFE, 2.

### **MINES AND MINERALS.**

*See* CONTRACT, 1.

### **MISDIRECTION.**

*See* STREET RAILWAYS, 1.

### **MISTAKE.**

*See* MUNICIPAL CORPORATIONS, 4.

### **MUNICIPAL CORPORATIONS.**

1. *Local Option By-law—Voting on—Method of Taking Vote—Votes of Illiterate Persons and those Physically Incapacitated—Municipal Act, 1903, sec. 171—Neglect of Deputy Returning Officers to Comply with Requirements of—Irregularities—Application of sec. 204.*—Upon an application to quash a local option by-law, upon the ground that the by-law, upon being submitted to the electors, did not receive the necessary majority of votes, it appeared that ten of the persons who voted were unable to read or write or were otherwise incapacitated from marking their ballot papers, and that the deputy returning officers marked ballot papers for them, without requiring them to make declarations of inability to read or physical incapacity, and in the absence of the agents appointed for and against the by-law, and without making the proper entries in the poll-books; in these respects failing to comply with the provisions

of sec. 171 of the Municipal Act, 1903:—

*Held*, that the vote of one of these persons should be disallowed, because it was clear upon the evidence that the deputy returning officer marked the ballot as he (the officer) pleased, the voter giving no direction.

As to three of the votes, they should not, upon the evidence, be disallowed.

As to the six remaining, it appeared that each of the voters had a full and fair opportunity to cast his ballot; that the six ballots were marked by the deputy returning officers in good faith and in accordance with the directions of the voters; that no objection was taken by the agents to the method adopted of taking the votes, but that that method was acquiesced in by every one present:—

*Held*, that the non-compliance with the provisions of the Act in regard to these six votes should not invalidate the by-law, the voting having been conducted in accordance with the principles of the Act, and the non-compliance not affecting the result: Municipal Act, sec. 204.

Head-note in *In re Duncan and Town of Midland* (1908), 16 O.L.R. 132, corrected.

*Re Young and Township of Binbrook* (1899), 31 O.R. 108, followed.

In the case of one of the ten voters a person accompanied her and was present with her in the polling-booth in circumstances which enabled that person to ascertain how the voter's ballot was being marked:—

*Held*, that that fact did not, in the circumstances, affect the result.

The motion to quash the by-law was dismissed without costs, the irregularities of the deputy returning officers, the appointees of the municipality, being such as to provoke suspicion and warrant the motion. *Re Prangley and Town of Strathroy*, 54

2. *Local Option By-law—Voting—Declaration by Clerk—Scrutiny by County Court Judge—Motion to Quash By-law—Inquiry into Validity of Votes—Illiterate Voters—Blind Voter—Ballots Marked by Deputy Returning Officers—Non-compliance with sec. 171 of Municipal Act—Secrecy of Voting—Manner of Voting—Names Improperly on Voters' List—Change of Residence—Married Woman Described as Widow—Discrepancy in Number of Ballots—Exposure of Ballots to Public after Count—Clerk Acting as Deputy Returning Officer—Irregularities—Curative Provisions of sec. 204—Acquiescence of Applicant—Estoppel.*]

The result of the voting upon a local option by-law, as declared by the clerk, was that 571 votes were cast for the by-law and 232 against, i.e., a total of 603 votes, of which more than three-fifths were for the by-law. Upon a scrutiny before a County Court Judge one vote which had been wrongly counted for the by-law was transferred to the other side, two ballots were rejected for defect of form, and 10 votes were struck off the winning side, because, as the Judge found, 10 persons had voted who had no right to do so. According to this result, the total of the votes was 591, 358 of which were cast for the by-law, being more than three-fifths. The Judge certified, under sec. 371 of the Municipal Act, 1903, that the by-law had re-

ceived the approval of more than three-fifths of the electors voting thereon.

Upon a motion to quash the by-law:—

*Quære*, whether there is any necessity for a summing up or declaration by the clerk; but *held*, upon the evidence, that the declaration required by the Act was made by the clerk.

The by-law being now attacked on the ground that it had not in fact received the approval of three-fifths of the electors voting thereon:—

*Held*, that it lay upon the applicant to shew that a sufficient number of votes must be struck off to establish that upon the declaration by the clerk, with the proper changes, the requisite majority was not in fact obtained. The Court should start with the result declared by the clerk, not that found by the County Court Judge; upon motions of this kind the Court may go behind the findings of the County Court Judge—his judgment in disallowing as well as in allowing votes may be attacked.

Of the 371 votes counted in the declaration of the clerk for the by-law, it was admitted that one was counted by mistake for, instead of against; this left 370 for and 233 against:—

*Held*, that it would be necessary to strike 21 votes off the 370 to reduce the majority vote below the statutory minimum. Process of arriving at this figure explained.

The votes of a number of persons, illiterates and others, whose ballots were marked for them by the deputy returning officers were objected to, on the ground that these persons had not been required to take declarations, and that the marking had not been

done in the presence of the agents, as required by sec. 171 of the Municipal Act:—

*Held*, in the case of one of these, a blind voter, that no declaration was needed; and as to the irregularity of marking his ballot in his presence alone, and not in the presence of the agents, that his vote could not be struck off on that ground, for the right to vote could not be considered to depend upon the manner of voting.

Two very old women, who stated that they were unable to mark their ballots, were each accompanied into the voting compartment by a relative, with the permission of the deputy returning officer, upon the consent of the agents, including the person moving to quash the by-law, without any declaration of physical incapacity being made:—

*Held*, that these votes could not be struck off; it was not the right to vote, but the manner of voting, that was objected to.

At one of the polling subdivisions there were 6 unmarked or spoiled ballots in the box. There was evidence that one of the voters at this place threw down the ballot upon the table, after having taken it into the voting compartment and returned with it, saying that she would have nothing to do with it. Being examined as a witness upon the motion, she refused to say whether she had made any marks upon the ballot. The ballot was placed in the box. It was contended that her vote should not have been counted:—

*Held*, that the Court, upon these facts, was not bound to find that this ballot was marked at all.

It was sworn that one voter was allowed to mark her ballot in public and without retiring into

the compartment. This was not specifically denied:—

*Held*, taking the incident as sworn to, that the vote was not invalidated by an irregularity in voting.

Of the 10 persons found by the County Court Judge to have voted, not having the right to vote, by reason of change of residence, 5 were persons whose places of residence had not been changed since the certification of the voters' list used at the voting:—

*Held*, that the judgment in *In re Local Option By-law of the Township of Saltfleet* (1908), 16 O.L.R. 293, 302, did not apply; and the Act prevented an inquiry by the County Court Judge, or by the Court upon this motion, into the right of these 5 persons to vote.

The name of a married woman was entered on the list as "widow." It was shewn that she owned the property assessed to her as "widow," and was the person intended by the description:—

*Held*, that her name was on the list, and she had a right to vote.

In one of the polling subdivisions 220 ballots were handed out, 220 voters were entered as voting, but 221 ballots were taken out and counted:—

*Held*, that, upon this state of facts, a vote should not be struck off the winning side.

After the close of the poll in one subdivision the ballots were thrown loosely into a basket, after they had been regularly counted and certified, and were left exposed after the general public were admitted, so that they would have access to them, before they were replaced in the ballot-box:—



*Held*, that this did not affect the result, and at the worst was an irregularity after the taking of the vote.

The clerk of the municipality acted not only as returning officer, but also as deputy returning officer in one of the polling subdivisions:—

*Held*, following *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464, 467, that this was an irregularity; but it was only an irregularity.

Objections to 16 other votes were not considered, as, if they were all allowed, the result would not be affected.

And *held*, that all the irregularities were covered by sec. 204 of the Act.

It was contended that the applicant, who was an agent at one of the polling subdivisions, was estopped by his acquiescence; but *semble*, that in a public matter such as this the doctrine of estoppel has no place. *Re Ellis and Town of Renfrew*, 74.

3. *Local Option By-law—Voting on — Majority — Votes Objected to—Number Necessary to Destroy Majority—Posting Copies of By-law—Publication in Newspaper—Municipal Act, 1903, sec. 338 (2)—Omission—Effect on Result—Application of sec. 204—Negligence of Municipal Officers — Costs.*] — A local option by-law was submitted to the electors and approved by a vote of 481 in favour of the by-law out of a total vote of 781, the statutory minimum being thus exceeded by 12:—

*Held*, that the least number of votes which would require to be struck off to destroy the majority was 32; and therefore it was not necessary, upon a motion to quash the by-law, to consider the

objection that 20 persons voted who had no right to vote.

(2) Upon the evidence, sec. 338 (2) of the Municipal Act, 1903, had not been complied with, copies of the by-law not having been put up at four of the most public places in the municipality; and sec. 204 of the Act did not apply to heal this defect, the onus of proving that the omission had not affected the result being upon the municipality, and not having been met; and upon this ground the by-law should be quashed.

(3) The by-law was published in a newspaper issued outside the municipality in a certain village, without the authority of a resolution by the council, as required by sec. 338 (2). The clerk said, "We always get our printing done there:—"

*Held*, following *In re Salter and Township of Beckwith* (1902), 4 O.L.R. 51, that an objection to the by-law based on this irregular publication was not tenable.

Remarks on the neglect of municipal officers to observe the plain directions of the statute.

Costs imposed on the municipality. *Re Begg and Township of Dunwich*, 94.

4. *Local Option By-law—Voting —Form of Ballot—Liquor License Act, sec. 141, sub-sec. 8—Mistake —Interpretation Act, sec. 7 (35)—Municipal Act, sec. 204.]—By 8 Edw. VII. ch. 54, sec. 10, the Ontario Liquor License Act, sec. 141, is amended by adding thereto a sub-section providing that the form of the ballot paper to be used for voting on a by-law prohibiting the sale by retail in a municipality of intoxicating liquors shall be "For Local Option"—"Against Local Option."*



After the passing of the amending Act, a by-law was submitted to the electors of a town, and the form of ballot paper used was not that prescribed by the amendment, but "For the By-law"—"Against the By-law:"—

*Held*, MIDDLETON, J., *dubitante*, that the defect in form was cured by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (35); that the mistake was not such as was calculated to mislead the voters; and (*per* BRITTON, J.) that, upon the material before the Court, the voting was, apart from this mistake, conducted according to the principles of the Act, and the result was not affected by the mistake; and, therefore, sec. 204 of the Municipal Act could be applied.

Order of MEREDITH, C.J.C.P., 1 O.W.N. 698, affirmed. *Re Giles and Town of Almonte*, 362.

5. *Local Option By-law—Voting—Town Clerk—9 Edw. VII. ch. 73, sec. 9—Special Meeting of Council—Good Friday—Municipal Act, sec. 270 (1)—Printing Done by Clerk—Disqualification—Scrutineer—Appointment—Right to Vote in Subdivision where Acting—Certificate—Deputy Returning Officer—Qualification as Voter—Voters "Named" in List—Inquiry as to Qualification—Mistake—Person Intended—Inability to Mark Ballot—Absence of Declaration of Secrecy—Presence of Unauthorised Electors—Effect on Right to Vote—Entering Names in Poll Book before Polling Day—Irregularity—Appointment of Scrutineers—Time Fixed not Observed—Municipal Act, sec. 342—Saving Clause, sec. 204—Irregularities not Affecting Result.*—Upon a motion to quash a local option by-law:—

*Held*, having regard to the amendment of sec. 351 of the Municipal Act by 9 Edw. VII. ch. 73, sec. 9, that the clerk of a municipality can vote upon the submission of such a by-law to the electors.

(2) That the action of the council, unanimous and without objection, in finally passing the by-law at a meeting held on Good Friday, was valid.

*Foster v. Toronto R.W. Co.* (1899), 31 O.R. 1, referred to.

(3) That, a special meeting of the council having been held on the 21st March for the purpose of finally passing the by-law and having been adjourned until the 28th March, it was not illegal to pass the by-law at another special meeting called for the 25th March: sec. 270 (1) of the Municipal Act.

(4) That the clerk of the municipality was not disqualified by reason of his having published the by-law and done the printing in connection with it, nor because he had printed for pay certain literature in regard to the contest over the by-law for the organised class of electors who were advocating the adoption of it.

(5) That the appointment of D. to act as scrutineer in polling subdivision No. 1, the certificate of the clerk that he was entitled to vote in No. 1, and the delivery of both to the deputy returning officer for No. 1, were sufficiently proved; and the clerk's certificate, that D., a scrutineer in polling subdivision No. 1, was qualified to vote in polling subdivision No. 2, on lot 16 West Main, and that this certificate entitled him to vote in polling subdivision No. 1, contained all that the Act required—the words "for or against the by-law" not being necessary.

6. That N., the deputy returning officer in No. 2, whose certificate read, "is a duly qualified tenant in polling subdivision No. 1, and is, therefore, entitled to vote in No. 2," was properly allowed to vote in No. 2, being "a person claiming to vote as a tenant:" sec. 113.

(7) That the real qualification of a voter whose name was on the list for No. 2 and who voted in No. 2, could not be inquired into: 7 Edw. VII. ch. 4, sec. 24.

(8) That persons "named" in the voters' list, even if their qualifications were not stated or were not sufficiently stated, were entitled to vote: 7 Edw. VII. ch. 4, sec. 24.

*In re McGrath and Town of Durham* (1908), 17 O.L.R. 514, followed.

(9) That Arthur S. Bashford was entitled to vote, as "the person . . . intended to be named" in the voters' list, the name in the list being "Bashford, Geo. S.:" Municipal Act, sec. 112.

*In re Armour and Township of Onondaga* (1907), 14 O.L.R. 606, 608, followed.

(10) That persons whose names appeared on the list as "Morgan, Dr.," "Nichols, Mrs.," were entitled to vote—there was no necessity for having the full name.

(11) That the objection that a number of persons voted openly without having previously made declarations of secrecy, and voted in the presence of unauthorised electors and persons, should not be given effect to in determining the number of votes for a by-law; the objection does not go to the right to vote.

(12) That the entering in the poll books before the day of polling of the names of the persons on the voters' list was irregular, but

it could not affect the result, nor the right of any voter to vote.

(13) That the fact (if it was a fact) that, although sec. 341 of the Municipal Act was complied with by the council fixing a time and place for the appointment of persons to attend at the various polling places, sec. 342 was not complied with because the head of the municipality did not appoint at the time fixed, was not fatal to the by-law; sec. 342 is a provision "as to the taking of the poll," and so covered by sec. 204, which should be applied.

*Re Bell and Corporation of Elma* (1906), 13 O.L.R. 80, and *Re Kerr and Town of Thornbury* (1906), 8 O.W.R. 451, explained.

(14) That, notwithstanding several irregularities, the by-law was saved by sec. 204.

Judgment of MEREDITH, C.J.C. P., affirmed. *Re Schumacher and Town of Chesley*, 522.

6. *Local Option By-law—Voting on — Voters' List Certified by County Court Judge — Ontario Voters' Lists Act — Complaint — Notice of Holding Court—Duty of Clerk.*—The certified list of voters used at the voting upon a local option by-law, being the list in fact certified by the Judge of the County Court, was held, the proper list, within the meaning of the Voters' Lists Act, notwithstanding that the Judge might have omitted to comply with the requirements of sub-sec. 4 of sec. 17, as to the publication of notice of the sittings of the Court for the revision of the list, and that the only person who made a complaint was a person not entitled under the Act to be a complainant.

The last *de facto* certified voters' list filed in the office of the Clerk

of the Peace is all that the clerk of the municipality is to concern himself with; and where an election has been held at which such a list has been used, it is not open to attack because of some informality or omission on the part of the Judge or of any of the officers intrusted with duties in connection with the list in the performance of their duties under the Act in accordance with its provisions. *Re Ryan and Town of Alliston*, 582.

7. *Maintenance of Bridge—Duty of County Council—Bridge Crossing Stream Forming Boundary between Local Municipalities—Assumption by County—Enforcement of Obligation to Repair—Decision of County Council—Review by County Court Judge—Municipal Act, 1903, secs. 613-618, 622 (a).*]—A bridge spanning the Muskrat river, which forms the boundary line between the township of Pembroke and the town of Pembroke, was built by private persons; in 1875 it was repaired by a committee appointed by the county council, and the repairs were in 1876 paid for by the county, since which time the county council had done nothing to keep it in repair; it had been kept in repair, however, by private subscriptions, and had been constantly used by the public, the road of which it formed part being a public highway, accepted and used as such for more than forty years:—

*Held*, that it had been assumed in 1875 as a county bridge; and the county corporation were not, by their subsequent neglect of duty, relieved from their obligation to maintain and repair it.

*Held*, also, that, having regard to the provision in clause (a) of

sec. 622 of the Municipal Act, 1903, and upon a consideration of the provisions of secs. 613 to 618, the duty was imposed upon the county of maintaining the bridge, whether it was ever formally assumed by the county or not.

*O'Connor v. Townships of Otonabee and Douro* (1874), 35 U.C.R. 73, distinguished.

*Held*, also, that the obligation can be enforced under sec. 618.

*Quere*, per MIDDLETON, J., whether the decision of the county council can be reviewed by the County Court Judge.

Judgment of the Judge of the County Court of Renfrew affirmed. *Re Township of Pembroke and County of Renfrew*, 366.

8. *Maintenance of Lock-up House—Duty of Corporation to Prisoner—Lack of Proper Heating—Negligence—Injury—Constable—Caretaker—Corporation Acting as Deputy of the Crown—Respondeat Superior.*]—The plaintiff was confined in a lock-up house provided and maintained by the defendants, a town corporation. He alleged that during his confinement the lock-up house was not kept properly warm, and that exposure to the cold brought on a serious illness, and he claimed damages for negligence. During the time of the plaintiff's detention the lock-up house was in charge of M., the chief constable of the town, appointed by the council, and L., the caretaker of the house, appointed by the council, who was also a constable under M.:—

*Held*, affirming the judgment of a Divisional Court, 16 O.L.R. 538, that the defendants were not liable.

*Per* GARROW, J.A., that the distinction between the liability of



a municipal corporation for the consequences of its acts when acting as a deputy for the Crown or the general government, and when it represents only the interests of the inhabitants within its local jurisdiction, is clearly drawn; this case belonged to the former class; the rule *respondet superior* did not apply; and the result would not be different even if L. were regarded solely as caretaker, and not as constable.

*Per* MEREDITH, J.A., that the defendants owed no legal duty to the plaintiff regarding the lock-up house or its maintenance. *Nettleton v. Town of Prescott*, 561.

9. *Money By-law—Voting on—Voters' List—Finality—Voters' Lists Act, sec. 24—List Prepared by Clerk from Assessment Roll—Persons Entitled to Vote—Freeholders—Leaseholders—Municipal Act, 1903, secs. 348, 349, 353, 354—Unqualified Voters—Persons in Possession of Land under Agreements of Sale—Inquiry into Right to Vote of Persons Named on List—Motion to Quash By-law.*—Upon a motion to quash a township by-law authorising the issue of debentures for the purpose of granting aid to a railway company:—

*Held*, that the certified list mentioned in sec. 24 of the Voters' Lists Act was not the list used or proper to be used in taking the vote on the by-law; but the list to be used was that prepared by the clerk from the assessment roll; and, therefore, the voters' list upon which the voting took place was not, by force of sec. 24, or for any other reason, conclusive as to the right of the persons named in it to vote on the by-law.

Reference to secs. 348 (amended by 8 Edw. VII. ch. 48, sec. 4), 349,

353, and 354 (amended by 9 Edw. VII. ch. 73, sec. 10), of the Consolidated Municipal Act, 1903.

All the municipal electors are not entitled to vote on a municipal by-law, but only those mentioned in sec. 353, freeholders, and in sec. 354, leaseholders.

The by-law was carried by a majority of 4; one vote was admittedly bad; and another was clearly bad, because the person who voted had no estate in the land in respect of which he voted, his only interest being as a shareholder of a company to which it belonged.

Three persons, who voted as freeholders, were in possession of the parcels of land in respect of which they voted, under parol agreements with the owners, entitling them, on doing something which had not yet been done, to conveyances:—

*Held*, that they were not qualified as freeholders.

*In re Platt and United Counties of Prescott and Russell* (1890), 18 A.R. 1, applied and followed.

*Held*, therefore, that a sufficient number of unqualified persons voted to overcome the majority in favour of the by-law; and it was quashed accordingly.

Judgment of MULOCK, C.J. Ex.D., reversed. *Re Dale and Township of Blanchard*, 497.

10. *Power to Regulate Victualling Houses—Municipal Act, sec. 583 (34)—Sunday Closing By-law—Reasonable Restraint—Enforcement of Sunday Observance.*—A city by-law provided that all eating houses should be closed on Sunday between 2 p.m. and 5 p.m. and also from 7.30 p.m. on Sunday to 5 a.m. on Monday:—

*Held*, MEREDITH, J.A., dissenting, a valid by-law, as a regulation



authorised by sec. 583 (34) of the Municipal Act, and not unreasonable or oppressive.

*City of Toronto v. Virgo*, [1896] A.C. 88, distinguished.

Order of BOYD, C., 20 O.L.R. 178, affirmed.

*Per* MEREDITH, J.A., that the by-law ought to have been quashed, for the reason that it was not passed for the purpose of regulating victualling houses, but for the purpose of compelling the better observance of the Lord's day, a subject quite beyond the power of the council. *Re Karry and City of Chatham*, 566.

See CONSTITUTIONAL LAW — HIGHWAY—TRIAL—WAY.

### NEGLIGENCE.

1. *Collapse of Building—Injury to Person in Neighbouring Building — Finding of Jury — Res Ipsa Loquitur—Independent Contractor — Duty and Responsibility of Owner—Evidence.*]—Every owner of a building is under a legal obligation to take reasonable care that his building shall not fall in the street or upon his neighbour's land and injure persons lawfully there; and he is liable for injuries caused by the failure on his part to exercise reasonable care; the degree of care required must depend upon the circumstances of each case.

The defendant R. made a lease to S. of a four-storey building for twenty-five years from the 1st August, 1907, which lease contained an agreement by S. to make alterations and improvements in the building, one of which was the removal of between fifty and sixty feet of a section of the wall which divided the first floor of the main building into two compartments, and the substitution there-

for of three iron columns supporting steel beams against the wall above, and resting on plates imbedded in cement on top of the wall below. S. was allowed to take possession of the first floor about the 10th June, 1907, for the purpose of making the alterations, R. remaining in possession of the rest of the building. S. engaged a firm of contractors to do the work, and it was done under the supervision of an architect. The work of putting in the steel beams and iron columns was completed on the 12th July, 1907, and the shoring which had been used to support the wall until the columns were in place, was removed. On the 16th July the building collapsed, and the easterly wall fell against B.'s building to the east (separated from it by a lane), and the plaintiff, B.'s clerk, was injured. In an action to recover damages for her injuries, the jury found that they were caused by the defendants' negligence, which consisted "in placing the iron columns in a defective wall:"—

*Held*, that the facts of the case brought it within the rule of evidence *res ipsa loquitur*, and that, in the absence of any explanation by the defendants, the presumption must be that the building fell because of some defect in the plan or design for the alterations or by reason of some negligence in making the alterations; and whether or not the negligence was that found by the jury, it was not incumbent upon the plaintiff to shew.

*Held*, also, that the possession and control by S. conferred no greater rights and imposed no greater responsibilities upon him than would be conferred and imposed upon any other independent contractor employed by R.

to make the alterations, who on his part might sub-contract the work, as S. did; and that R. was responsible for the injuries caused by the collapse of the building, notwithstanding that the negligence to be presumed was that of S. or his architect or the sub-contractors or some one employed by them; when R. contracted with S. for the alterations, he owed to the plaintiff and the other occupants of the adjoining land a special duty of such a nature that he could not by delegating its performance to another escape liability for its non-fulfilment.

*Bower v. Peate* (1876), 1 Q.B.D. 321, *Dalton v. Angus* (1881), 6 App. Cas. 740, and *Penny v. Wimbledon Urban District Council*, [1899] 2 Q.B. 72, applied and followed.

Judgment of LATCHFORD, J., affirmed. *Earl v. Reid*, 545.

2. *Injury to Property by Overflowing of Water—Flats in Building Tenanted by Different Persons—Cause of Action—Tort—Assignment—Parties—Assignor and Assignee Joined as Plaintiffs.*—The defendants were held liable in damages for injury to the plaintiffs' premises by water overflowing from a tap negligently left running in the lavatory in the defendants' premises upon the floor above the plaintiffs' in the same building, both plaintiffs and defendants being tenants of the owner of the building.

*Per CLUTE, J.*:—The fair inference from the evidence was that the defendants, by themselves or their servants, who were allowed to use the lavatory, negligently left the tap running, and caused the injury complained of.

*Per MIDDLETON, J.*:—Where the claim is made against a tenant

occupying an upper flat, *prima facie* he is liable for the escape of water from a tap left open; the onus is upon him to establish facts freeing him from liability.

*Childs v. Lissaman* (1904), 23 N.Z.L.R. 945, specially referred to.

The action was originally brought by the assignees of the persons who were tenants of the lower premises when the damage was done, but the assignors were added as plaintiffs:—

*Held*, that, both parties being before the Court, a right of action was vested in either one or the other, and the effect of the assignment was immaterial.

Judgment of the County Court of York reversed. *Powley v. Mickleborough*, 556.

See HIGHWAY—MUNICIPAL CORPORATIONS, 3, 8 — RAILWAY — STREET RAILWAYS—WAY.

## NEW TRIAL.

See STREET RAILWAYS, 1, 2, 3.

## NEXT FRIEND.

See INFANT.

## NONREPAIR.

See TRIAL.

## NOTICE.

See BANKS AND BANKING, 2—CONTRACT, 2—LIQUOR LICENSE ACT, 1 — RAILWAY, 1 — VENDOR AND PURCHASER—WAY.

## NOTICE OF ACTION.

See LIQUOR LICENSE ACT, 1.

## OBSTRUCTION.

See HIGHWAY—TRIAL.

## OIL LEASES.

See EXECUTION.

**OPTION.**

See CONTRACT, 1—VENDOR AND PURCHASER.

**PARTIES.**

See COMPANY, 3—NEGLIGENCE, 2.

**PARTNERSHIP.**

*Holding out — Estoppel — Representation of Authority — Public Repute — Knowledge — Actual Authority — Scope of Business.] — Held,* upon the evidence, that there was no actual partnership between the defendant J. M. and his son the defendant H. M., carried on in the firm name of J. M. & Son; and (reversing the judgment of a Divisional Court, 20 O.L.R. 310) that there was no holding out by J. M. of his son H. M. as a member of the partnership; MEREDITH, J. A., dissenting.

*Per Moss, C.J.O.,* that the facts shewed it to be not a case of J. M. holding out his son to the plaintiffs as a partner, but of his son assuming to hold himself out to the plaintiffs as in partnership with his father. If the father was to be made liable, it must be because what was done was done under circumstances which bound him as well as his son; and there was no proof of any express authority, or of any acts from which authority might reasonably be inferred, to the son to represent his father as in partnership with him.

*Per MIDDLETON, J.,* that the plaintiffs must fail, because, assuming in their favour that there was a holding out, no evidence was given to shew that at the time credit was given the plaintiffs knew of the circumstances now relied on as constituting a "holding out," or that

they gave credit upon the faith of any public repute which would satisfy a jury "that the plaintiffs knew of it and believed him to be a partner:" *Dickinson v. Valpy* (1829), 10 B. & C. 128, 140; *Ford v. Whitmarsh* (1840), Hurl. & Walm. 53. And, again, the plaintiffs failed because the holding out was of a partnership as "general insurance agents," while the liability sought to be imposed was as "agents for the sale of signed money orders" issued by the plaintiffs, and such an agency was beyond the scope of the business held out.

*Per MEREDITH, J.A.,* that, upon the undisputed facts, there was authority from the father to the son to use the father's name and to pledge his credit; and, assuming that that authority extended only to the business of insurance agents, the transaction in question was sufficiently connected with that business to come within the authority. *Dominion Express Co. v. Maughan*, 510.

**PASSENGER.**

See STREET RAILWAYS.

**PATENT FOR INVENTION.**

See COMPANY, 3—PLEADING, 2.

**PAYMENT.**

See INSURANCE, 2.

**PAYMENT INTO COURT.**

See INFANT.

**PENALTY.**

See LIQUOR LICENSE ACT, 2.

**PLAN.**

See EASEMENT.



## PLEADING.

1. *Counterclaim—Order Striking out — Practice — Convenience — Connection with Cause of Action — Con. Rules 254, 261—Set-off—Stay of Proceedings—Trial.*]—To an action upon four promissory notes made by the defendants, an incorporated company, the defence was that the defendants had received no money by way of loan; that the notes were not binding; that they were made without consideration; that the plaintiff and one D. had agreed to deal together in real estate, and that any money advanced by the plaintiff had been advanced to D.; that the notes had been procured by the plaintiff from the defendants by conspiracy with D., under the representation that the defendants owed the plaintiff; that the plaintiff and D. and D.'s wife, having agreed to purchase and deal in real estate, used the pretended loan and other moneys and assets of the defendants for such purposes; and the defendants counterclaimed against the plaintiff and D. and his wife, as defendants by counterclaim, for an account of all moneys wrongfully used by them, for a refund, and for further and other relief:—

*Held*, that the counterclaim was properly pleaded, and should not have been struck out at the trial, either under Con. Rule 261 or Con. Rule 254; it was not made to appear that the claim and counterclaim could not be conveniently tried together.

Discussion of the practice and authorities in respect of counterclaim and set-off.

*Held*, also, that, even if an order striking out the counterclaim could be supported, it would be proper to stay the execution of the judgment obtained

at the trial against the defendants until the dealings of the plaintiff with the property of the defendants should be investigated; and that relief should be given to the defendants upon appeal from the order striking out the counterclaim, the judgment at the trial in favour of the plaintiff upon his claim being affirmed; and that judgment to stand for the protection *quantum valeat* of the plaintiff.

*Auerbach v. Hamilton* (1909), 19 O.L.R. 570, followed.

Order of SUTHERLAND, J., striking out the counterclaim, reversed. *Thompson v. Big Cities Realty and Agency Co.*, 394.

2. *General Rules—Action in Respect of Patents for Invention—Contract — Breach — Infringement—Statement of Defence and Counterclaim — License — Invalidity — Inconsistency — Alternative Relief—Costs—Con. Rule 273—Fraud—Estoppel.*]—There is no difference between the rules governing pleadings in the High Court in actions in respect of patents for inventions and those governing pleadings in any other ordinary action. The pleadings must disclose what is to be tried; every pleader is at liberty to allege any fact which would be allowed to be proved, but only such facts; and the facts are to be set out in an understandable form and not left to be inferred by mere conjecture. No pleading can be said to be embarrassing if it alleges only facts which may be proved; but a pleading which sets out a fact which would not be allowed to be proved is embarrassing. Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded; but the Court will not allow any



fact which is wholly immaterial, and can have no effect upon the result, to be alleged.

By the statement of claim the plaintiff alleged that he was the owner of certain Canadian patents for improvements in methods of manufacturing starches and other articles of commerce; that, by an agreement between the plaintiff and defendants, the defendants were allowed to use the plaintiff's inventions upon certain conditions and arrangements set forth; that the plaintiff had performed all that he was bound to do under the agreement; but that the defendants, having taken full advantage of the inventions, refused to carry out the obligations consequent thereon; he also alleged infringement of his patents; and claimed an injunction and damages for breach of contract, or an account of profits and an injunction against infringing, and a declaration that the defendants were not entitled to use the inventions under the agreement. The defendants, by their statement of defence and counterclaim, admitted the agreement, said that they had the right to manufacture under it, denied the validity of the patents, and asked for relief. The plaintiff moved to strike out so much of the statement of defence and counterclaim as denied the validity of the patents or that the inventions or improvements were either new or useful; and also the part of the counterclaim by which the defendants asked for a declaration that they were entitled to use the plaintiff's patents under the agreement in question, or, in the alternative, that the patents should be declared invalid. By the counterclaim also a declaration was sought that the plaintiff was re-

quired to carry out the agreement, and damages for his alleged failure to do so were claimed:—

*Held*, that the defendants were at liberty to attack the validity of the patents; if at the trial an existing and valid license to the company should be proved, the defence of invalidity of the patents would be of no avail; but there was no reason why at present the defendants should not set up inconsistent defences. They might also counterclaim for a declaration of the invalidity of the patents. If they had added other claims which were inconsistent and embarrassing, the Court might deal with that in disposing of the costs; a paragraph of a prayer for relief will rarely be stricken out; and, under Con. Rule 273, relief may be claimed in the alternative.

Order of the Master in Chambers, refusing the plaintiff's motion, affirmed.

Discussion of the defences of license and invalidity in patent cases, with special reference to fraud and estoppel, and review of the authorities. *Duryea v. Kaufman*, 161.

See COMPANY, 7—STREET RAILWAYS, 2.

### PLEDGE.

See BANKS AND BANKING, 1.

### POLICE MAGISTRATE.

See CRIMINAL LAW, 3—LIQUOR LICENSE ACT, 2, 3, 4.

### PRACTICE.

See COMPANY, 3, 5, 7—CRIMINAL LAW, 3—DEFAMATION—DIVISION COURTS—EVIDENCE—INFANT—LIQUOR LICENSE ACT, 3—NEGLECT—PLEADING—SOLICITOR—TRIAL.

**PRESUMPTION OF DEATH.**

*See* INSURANCE, 2.

**PRINCIPAL AND AGENT.**

*Moneys Intrusted to Agent for Purchase of Shares—Appropriation of Shares of Agent to Principal—Absence of Evidence to Shew Good Faith and Full Disclosure.*]

An agent, stock broker or other agent, employed to buy stock for another, cannot be allowed to transfer so much stock of his own as a fulfilment of his mandate. An agent may, indeed, sell to his principal property of his own, if it be proved that no advantage was taken by the agent of his position, and that the transaction was entered into in perfectly good faith and after full disclosure; but the onus of proving this lies upon the agent.

The defendant, having instructions from the plaintiff to buy for her 500 shares of the capital stock of a company, and having received \$500 for her for that purpose, did not buy for her 500 shares at all, but bought for himself 2,000 shares of pooled stock, out of which he intended to give her 500 shares (as being bought from himself) when the stock should be issued. The defendant did not give evidence to shew good faith and full disclosure:—

*Held*, that he was liable for the return of the \$500 and interest.

*Gillett v. Peppercorne* (1840), 3 Beav. 78, followed. *Johnson v. Birkett*, 319.

**PRIVATE LANE.**

*See* WAY.

**PRIVILEGE.**

*See* DEFAMATION.

**PROBATE.**

*See* WILL, 4.

**PROMISSORY NOTES.**

*Company—Signature—Abbreviations—Powers of Officers.*]

The promissory notes sued on were signed with the name of the defendant company, the words "Company" and "Limited," which were both part of the name, being abbreviated to "Co." and "Ltd.:"—

*Held*, that the notes were signed in the name of the company.

*Held*, also, that the plaintiff, having received the notes in good faith, and having nothing to do with the management of the company, was not affected by the alleged absence of proof that the persons who appeared to have affixed the name of the company to the notes were those having power to do so.

*Held*, also, upon the evidence, that the company were liable upon the notes.

Judgment of SUTHERLAND, J., upon the plaintiff's claim, affirmed. *Thompson v. Big Cities Realty and Agency Co.*, 394.

*See* BANKS AND BANKING, 2—DIVISION COURTS.

**PROMOTERS.**

*See* COMPANY, 4.

**PROVINCIAL LEGISLATURE.**

*See* CONSTITUTIONAL LAW.

**PROVISIONAL DIRECTORS.**

*See* COMPANY, 2.

**PUBLIC OFFICER.**

*See* LIQUOR LICENSE ACT, 1.

## PUBLIC SCHOOLS.

*Engagement of Teacher — Absence of Writing and Seal—Public Schools Act, 1 Edw. VII. ch. 39, sec. 81 (1)—Imperative Enactment—Costs.*]—By sec. 81, sub-sec. 1, of the Public Schools Act, 1 Edw. VII. ch. 39, "all agreements between trustees and teachers shall be in writing, signed by the parties thereto, and shall be sealed with the seal of the corporation." In the original of this enactment the words "to be valid and binding" were printed after the word "teachers," but were dropped in the consolidation of 1891, 54 Vict. ch. 55, sec. 132:—

*Held*, that the dropping of these words had not altered the effect of the provision; it must be read as imperative; and therefore the plaintiff, who was engaged as a teacher for a year, but without any written agreement, and was dismissed during the year, could not recover damages for wrongful dismissal.

*Birmingham v. Hungerford* (1869), 19 C.P. 411, and *Young v. Corporation of Leamington* (1882-3), 8 Q.B.D. 579, 8 App. Cas. 517, followed.

Judgment of the County Court of the County of Oxford reversed.

The defendants' conduct having been unmeritorious, they were left to bear their own costs throughout. *McMurray v. East Nissouri* (Section 3) *Public School Board*, 46.

## QUEBEC LAW.

See HUSBAND AND WIFE, 2.

## RAILWAY.

1. *Carriage of Goods—Claim for Detention—Failure to Give Notice—Contract—Condition—Misprint—"Or"—"Are"—Ap-*

*proval of Board of Railway Commissioners.*]—*Held*, affirming the judgment of TETZEL, J., 20 O.L.R. 285, in an action for damages for breach of a contract for the carriage of goods, that the word "are" should be substituted for "or" in the condition on the back of the shipping bill—in the form approved by the Board of Railway Commissioners—and, the contract being thereby rendered intelligible, and the plaintiff, not having complied with the requirements of the condition, that the defendants were relieved from the consequences of the negligence found against them. *Newman v. Grand Trunk R.W. Co.*, 72.

2. *Carriage of Goods—Destruction—Liability—Tort—"Active" Negligence—Contracts between Express Company and Shipper and between Express Company and Railway Company—Absence of Privity—Exemption—Indemnity—"Intrusted or Delivered for Transportation"—Application for Benefit of Railway Company.*]—The plaintiff delivered to the Dominion Express Company at Toronto a trunk of valuable samples to be carried to Quebec. The company gave him a receipt therefor, whereby, as he failed to place a value on the articles in the trunk, their value was fixed, as between him and the company, at \$50. The company was an independent company, operating upon the lines of railway of the defendants in Canada, under a general agreement with the defendants, by one clause of which the express company assumed all responsibility for and agreed to satisfy all valid claims for the loss of or damage to express matter in its charge, and to hold the defendants harmless and in-



demnified against such claims. The trunk was placed by the express company in a car of the defendants upon the defendants' railway, and was there, in charge of the express company's servant, when a collision occurred, as a result of which a fire took place, and the trunk and contents were destroyed. The defendants admitted that the collision was caused by the negligence of their servants:—

*Held*, that an action in tort lay against the defendants for the loss of the goods: the defendants were liable for their "active" negligence in bringing about the collision.

*Held*, also, that the defendants were not entitled, as against the plaintiff, to the exemption from liability stipulated for in their agreement with the express company, under which they received and were carrying the goods; nor to the benefit of the limitation of liability to \$50 provided for in the plaintiff's contract with the express company; for to the first agreement the plaintiff was a stranger, and to the second the defendants were in the same position; and, in addition, the exemption clauses should be construed strictly, and the exemptions claimed would not extend to include an act of collateral or "active" negligence.

*Martin v. Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9, specially referred to.

*Lake Erie and Detroit River R. W. Co. v. Sales* (1896), 26 S.C.R. 663, distinguished.

*Semble*, that, if the agreement between the plaintiff and the express company had any application, the clause "that the stipulation contained herein shall extend to and inure to the benefit of each

and every company or person to whom through this company the below described property may be intrusted or delivered for transportation" did not apply to the defendants, but to a person or company beyond the line of the defendants' railway, to whom it might be necessary for the express company to part with the property in order that it should reach its destination.

Judgment of RIDDELL, J. 19 O.L.R. 510, affirmed. *Allen v. Canadian Pacific R.W. Co.*, 416.

3. *Carriage of Goods—Failure to Deliver—Fault of Connecting Carrier—Transport by Sleigh-road—Contract—Conditions Relieving Railway Company—Common Carriers—Tort—Railway Act, sec. 284.*—The plaintiff delivered to the defendants lumber to be forwarded to G. station, subject to the conditions of the shipping bill, and paid the freight to G. The lumber was conveyed to S., the station nearest to G. on the defendants' line. The only transportation possible from S. to G. was over a sleigh-road by teams owned by a transport company, with whom the defendants had a working arrangement. The car containing the lumber was left on a siding at S., and the agent of the transport company was notified, but that company did not forward the lumber to G., and the defendants shipped it back to the plaintiff without delay, and returned the freight. By clause 10 of the conditions on the back of the shipping bill it was, *inter alia*, provided that the defendants did not contract for the safety or delivery of any goods except on their own lines, and that where a through rate was named to a point on other lines, the defend-



ants were to act only as agents of the owner of the goods as to that portion of the rate required to meet the charges on such other lines, and that their responsibility in respect of any loss, misdelivery, or detention of goods carried under the contract should cease as soon as the defendants should either deliver them to the next connecting carrier for further conveyance or notify such carrier that they were ready to do so:—

*Held*, in an action for breach of the contract by non-delivery of the goods, that this clause relieved the defendants; “the next connecting carrier” was not limited to a railway company operating other lines, but meant any connecting carrier.

Clause 15 provided that the defendants should not be liable for loss of market or for claims arising from delay or detention of any train in the course of its journey, and any loss or damages for which the defendants might be responsible should be computed upon the value or cost of the goods at the place and time of shipment:—

*Held*, that this clause also applied; the immunity from liability for loss of market was not limited to claims arising from delay or detention of any train, but was general.

*Held*, also, that, there being a limitation under the contract itself, the law applicable to common carriers did not apply.

*Held*, also, that the plaintiff was not entitled to succeed as in an action for tort, as the defendants received the lumber for carriage under the provisions of a special contract.

*Held*, lastly, that the defendants had fulfilled their obligations under the contract, and were not liable under sec. 284, clauses (b),

(c), and (d), of the Railway Act, R.S.C. 1906, ch. 37.

• Judgment of MAGEE, J., affirmed. *Laurie v. Canadian Northern R.W. Co.*, 178.

4. *Carriage of Live Stock — Special Contract — Approval by Board of Railway Commissioners — Injury to Persons in Charge Travelling Free, by Reason of Negligence — Neglect of Servants of Railway Company to Obtain Assent to Terms of Contract — Liability — Indemnity by Owners and Shippers — Duty to Inform Persons in Charge — Implied Agreement to Indemnify.*] — The third parties shipped two car-loads of horses over the defendants’ line, and placed G. and R. in charge. G. was killed and R. injured while on the defendants’ train, through the negligence of the defendants, and in actions brought by the administrator of the estate of G. and by R. against the defendants judgments were recovered against the defendants for damages for the negligence. The defendants sought indemnity against the third parties, the owners and shippers of the horses. Special contracts for shipment of live stock were signed by the defendants’ agent and by the third parties, the form of contract being that authorised by the Board of Railway Commissioners under the Railway Act of Canada. The rate of freight charged was that authorised under Canadian classification No. 14, dated the 15th December, 1908, and approved by the Board, in cases where the stock is shipped under the terms and conditions of the special contract, which classification contains certain general rules governing the transportation of live stock, including this, that the owner or his agent must accom-

pany each car-load, and owners or agents in charge of car-loads will be carried free on the same train with their live stock, upon their signing the special contract approved by the Board. G. and R. were carried free, but neither signed the special contract, nor was any pass issued and delivered to either of them embodying its terms, and neither of them knew the contents of the special contract. Upon the face of each contract was written, "Pass man in charge." Among the conditions of the contract were, that the liability of the defendants should be restricted to \$100 for the loss of any one horse, and that in case of the defendants granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare to ride on the train in which the property is being carried, for the purpose of caring for the same while in transit, and at the owner's risk, then, as to every person so travelling, the defendants are to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the defendants or their servants or employees, or otherwise howsoever. On the back of the contract, and as part of the document approved by the Board, provision was made for each person entitled to free passage to sign his name, followed by a note that agents must require such persons to write their own names on the lines above. The defendants' agent neglected to observe this direction:—

*Held*, that the third parties owed no duty to the defendants to inform G. and R. of the terms of the special contract.

2. Looking at the express terms of the written contract, including

the rule set forth in classification 14, intended for the guidance of both parties, and having regard to all the circumstances under which the contract was entered into, there was no implied agreement on the part of the third parties to indemnify the defendants, in order to give the transaction such efficacy as both parties must have intended it to have. There would have been no claim against which to be indemnified if the defendants' agent had performed his duty, and it would be contrary to principle to imply an agreement by the third parties to protect the defendants from the consequences of their own carelessness. *Goldstine v. Canadian Pacific R.W. Co.*, *Robinson v. Canadian Pacific R.W. Co.*, 575.

*See* COMPANY, 2—CONTRACT, 2—STREET RAILWAYS.

### RATIFICATION.

*See* INFANT.

### REAL PROPERTY LIMITATION ACT.

*See* DEVOLUTION OF ESTATES ACT—EASEMENT.

### REASONABLE AND PROBABLE CAUSE.

*See* MALICIOUS PROSECUTION.

### REGISTRY LAWS.

*See* EASEMENT.

### RENT.

*See* LANDLORD AND TENANT.

### RES IPSA LOQUITUR.

*See* NEGLIGENCE, 1.

### RESPONDEAT SUPERIOR.

*See* MUNICIPAL CORPORATIONS, 8.

**RETAINER.***See* SOLICITOR.**REVIVOR.***See* EVIDENCE.**REVOCATION.***See* INSURANCE, 1.**RIVERS AND STREAMS.***See* MUNICIPAL CORPORATIONS,  
7.**RULES.**

- Con. Rule 251.]—*See* COMPANY,  
7.  
Con. Rule 254.]—*See* PLEADING,  
1.  
Con. Rule 261.]—*See* PLEADING,  
1.  
Con. Rule 273.]—*See* PLEADING,  
2.  
Con. Rule 289.]—*See* INFANT.  
Con. Rule 295.]—*See* INFANT.  
Con. Rule 483.]—*See* EVIDENCE.  
Con. Rule 840.]—*See* INFANT.

**SALE OF LAND.***See* VENDOR AND PURCHASER.**SALVAGE.***See* COMPANY, 5.**SCHOOLS.***See* PUBLIC SCHOOLS.**SEAL.***See* PUBLIC SCHOOLS.**SECRET PROFITS.***See* COMPANY, 4, 5.**SECURITY.***See* COMPANY, 1.**SENTENCE.***See* CRIMINAL LAW, 3, 4.**SET-OFF.***See* COMPANY, 7—PLEADING, 1.**SETTLEMENT OF ACTION.***See* INFANT—SOLICITOR.**SHARES AND SHARE-HOLDERS.***See* BANKS AND BANKING, 2—  
COMPANY — DAMAGES — PRINCIPAL AND AGENT.**SICK BENEFITS.***See* BENEFIT SOCIETY.**SIDEWALK.***See* TRIAL—WAY.**SOLICITOR.**

*Retention of Client's Money — Order for Delivery of Bill of Costs — Disobedience — Attachment — Settlement — Receipt — Promise to Pay "Retainer" — Inability to Prepare Bill.*—A solicitor received for his client, as the result of the settlement of an action in which the client was plaintiff, \$2,600, and paid her \$645, retaining the balance, but delivering no bill. In a document drawn by the solicitor, the client agreed to pay him "a retainer of \$2,000." The solicitor swore that he paid the client \$645 in full of all claims, and produced a copy of a cheque for \$645 marked "in full of all claims." The solicitor was ordered to deliver a bill of his costs, and, upon his failing to do so, a motion was made to attach him for his disobedience. It was stated that the solicitor was unable to prepare and deliver a bill. The solicitor also set up that the sum of \$2,600 was intended to include \$740 costs agreed to be paid by the defendant in the action:—

*Held*, that, assuming that the



defendant paid the plaintiff's costs of the action, fixed at \$740, the plaintiff's solicitor received it as agent and trustee for the plaintiff; the solicitor was not a party to the agreement.

2. That a promise to pay a "retainer" cannot be enforced in law; a retainer is a gift by the client to the solicitor, and, like all gifts, must be a voluntary act.

3. That there can be no binding settlement between solicitor and client without a bill; and, apart from this, it was not shewn that the client was advised of her rights when she made the alleged settlement by accepting \$645 "in full of all claims;" and, as the solicitor still asserted his right to the "retainer," it was fair to assume that it was a factor in the settlement, and the client would not be bound.

4. That the suggested inability of the solicitor to prepare a bill afforded no excuse for disobedience to the order.

An order was made for an attachment, but not to issue for two weeks, and if, in the meantime, the solicitor should deliver a bill or a statement in writing that he made no claim against the client for costs or disbursements, the order should not issue. *Re Solicitor*, 255.

*See* INFANT.

### SPEEDY TRIAL.

*See* CRIMINAL LAW, 4.

### STATUTE OF LIMITATIONS.

*See* DEVOLUTION OF ESTATES ACT—EASEMENT.

### STATUTES.

3 W. & M. ch. 14 (Property Appointed made Assets for Payment of Debts).

*See* DEVOLUTION OF ESTATES ACT.

54 Vict. ch. 55, sec. 132 (O.) (Public Schools Act).

*See* PUBLIC SCHOOLS.

R.S.O. 1897, ch. 51, sec. 57 (7) (Judicature Act).

*See* COMPANY, 7.

R.S.O. 1897, ch. 51, sec. 104 (Judicature Act).

*See* TRIAL.

R.S.O. 1897, ch. 60, sec. 72, sub-sec. 1 (d), sec. 72a (Division Courts Act).

*See* DIVISION COURTS.

R.S.O. 1897, ch. 73, sec. 2 (Evidence Act).

*See* LIQUOR LICENSE ACT, 3.

R.S.O. 1897, ch. 73, sec. 10 (Evidence Act).

*See* GIFT.

R.S.O. 1897, ch. 83 (Habeas Corpus).

*See* LIQUOR LICENSE ACT, 3.

R.S.O. 1897, ch. 87, sec. 22 (Police Magistrates).

*See* LIQUOR LICENSE ACT, 2.

R.S.O. 1897, ch. 88, sec. 2 (Justices of the Peace and Other Public Officers).

*See* LIQUOR LICENSE ACT, 1.

R.S.O. 1897, ch. 127, sec. 13 (Devolution of Estates Act).

*See* DEVOLUTION OF ESTATES ACT.

R.S.O. 1897, ch. 203, sec. 80 (Insurance Act).

*See* INSURANCE, 2.

R.S.O. 1897, ch. 203, sec. 151 (Insurance Act).

*See* INSURANCE, 1.

R.S.O. 1897, ch. 209, sec. 44 (Electric Railway Act).

*See* COMPANY, 2.

R.S.O. 1897, ch. 224, sec. 26 (Assessment Act).

*See* LANDLORD AND TENANT, 1.

R.S.O. 1897, ch. 245, secs. 72, 89, 101, 105 (Liquor License Act).

*See* LIQUOR LICENSE ACT, 3.

R.S.O. 1897, ch. 245, secs. 78, 118, 120 (Liquor License Act).

*See* LIQUOR LICENSE ACT, 4.

R.S.O. 1897, ch. 245, sec. 105 (Liquor License Act).

*See* LIQUOR LICENSE ACT, 2.

R.S.O. 1897, ch. 245, sec. 125 (1) (Liquor License Act).

*See* LIQUOR LICENSE ACT, 1.

R.S.O. 1897, ch. 245, sec. 141, sub-sec. 8 (Liquor License Act).

*See* MUNICIPAL CORPORATIONS, 4.

R.S.O. 1897, ch. 308, sec. 30 (Central Prison).

*See* CRIMINAL LAW, 3.

R.S.O. 1897, ch. 342 (Distress).

*See* LANDLORD AND TENANT, 3.



- 1 Edw. VII. ch. 39, sec. 81 (1) (O.) (Public Schools Act).  
*See PUBLIC SCHOOLS.*
- 1 Edw. VII. (ch. 92, secs. 9, 12 (O.) (Special Act incorporating Electric Railway Company).  
*See COMPANY, 2.*
- 2 Edw. VII. ch. 1, secs. 2, 4 (O.) (Amending Devolution of Estates Act).  
*See DEVOLUTION OF ESTATES ACT.*
- 2 Edw. VII. ch. 17 (O.) (Amending Devolution of Estates Act).  
*See DEVOLUTION OF ESTATES ACT.*
- 3 Edw. VII. ch. 19, secs. 112, 113, 204, 270 (1), 342, 351 (O.) (Municipal Act).  
*See MUNICIPAL CORPORATIONS, 5.*
- 3 Edw. VII. ch. 19, secs. 171, 204 (O.) (Municipal Act).  
*See MUNICIPAL CORPORATIONS, 1, 2.*
- 3 Edw. VII. ch. 19, sec. 204 (O.) (Municipal Act).  
*See MUNICIPAL CORPORATIONS, 4.*
- 3 Edw. VII. ch. 19, secs. 204, 338 (2) (O.) (Municipal Act).  
*See MUNICIPAL CORPORATIONS, 3.*
- 3 Edw. VII. ch. 19, secs. 348, 349, 353, 354 (O.) (Municipal Act).  
*See MUNICIPAL CORPORATIONS, 9.*
- 3 Edw. VII. ch. 19, sec. 583 (34) (O.) (Municipal Act).  
*See MUNICIPAL CORPORATIONS, 10.*
- 3 Edw. VII. ch. 19, secs. 613-618, 622 (a) (O.) (Municipal Act).  
*See MUNICIPAL CORPORATIONS, 7.*
- 4 Edw. VII. ch. 12, sec. 1 (O.) (Amending Division Courts Act).  
*See DIVISION COURTS.*
- R.S.C. 1906, ch. 1, sec. 30 (Interpretation Act).  
*See BANKS AND BANKING, 1.*
- R.S.C. 1906, ch. 29, secs. 76, 99 to 111 (Bank Act).  
*See BANKS AND BANKING, 1, 2.*
- R.S.C. 1906, ch. 37, sec. 284 (Railway Act).  
*See RAILWAY, 3.*
- R.S.C. 1906, ch. 79, secs. 45, 64-68, 80 (Companies Act).  
*See COMPANY, 6.*
- R.S.C. 1906, ch. 144 (Winding-up Act).  
*See COMPANY, 1.*
- R.S.C. 1906, ch. 145, sec. 3 (Evidence Act).  
*See LIQUOR LICENSE ACT, 3.*
- R.S.C. 1906, ch. 146, secs. 10, 370, 386, 582, 824, 825, 1016, 1018, 1051, 1056 (Criminal Code).  
*See CRIMINAL LAW, 4.*
- R.S.C. 1906, ch. 146, sec. 315 (Criminal Code).  
*See CRIMINAL LAW, 1.*
- R.S.C. 1906, ch. 146, secs. 446, 782, 783, 852, 1120-1132 (Criminal Code).  
*See CRIMINAL LAW, 3.*
- R.S.C. 1906, ch. 146, secs. 739, 754, 1124 (Criminal Code).  
*See LIQUOR LICENSE ACT, 3.*
- R.S.C. 1906, ch. 148, sec. 46, 47 (Prisons and Reformatories).  
*See CRIMINAL LAW, 3.*
- 6 Edw. VII. ch. 7, sec. 33 (O.) (Amending Liquor License Act).  
*See LIQUOR LICENSE ACT, 1.*
- 6 Edw. VII. ch. 15 (O.) (Hydro-Electric Power Commission).  
*See CONSTITUTIONAL LAW.*
- 7 Edw. VII. ch. 2, sec. 7 (35) (O.) (Interpretation Act).  
*See MUNICIPAL CORPORATIONS, 4.*
- 7 Edw. VII. ch. 4, sec. 17 (4) (O.) (Voters' Lists Act).  
*See MUNICIPAL CORPORATIONS, 6.*
- 7 Edw. VII. ch. 4, sec. 24 (O.) (Voters' Lists Act).  
*See MUNICIPAL CORPORATIONS, 5, 9.*
- 7 Edw. VII. ch. 19 (O.) (Hydro-Electric Power Commission).  
*See CONSTITUTIONAL LAW.*
- 7 Edw. VII. ch. 34, secs. 68, 69 (O.) (Companies Act).  
*See COMPANY, 7.*
- 7 Edw. VII. ch. 46, sec. 8 (O.) (Amending Liquor License Act).  
*See LIQUOR LICENSE ACT, 4.*
- 8 Edw. VII. ch. 22 (O.) (Hydro-Electric Power Commission).  
*See CONSTITUTIONAL LAW.*
- 8 Edw. VII. ch. 48, sec. 4 (O.) (Amending Municipal Act).  
*See MUNICIPAL CORPORATIONS, 9.*
- 8 Edw. VII. ch. 54, sec. 10 (O.) (Amending Liquor License Act).  
*See MUNICIPAL CORPORATIONS, 4.*
- 8 & 9 Edw. VII. ch. 9 (D.) (Amending Criminal Code).  
*See LIQUOR LICENSE ACT, 3.*
- 9 Edw. VII. ch. 19 (O.) (Hydro-Electric Power Commission).  
*See CONSTITUTIONAL LAW.*
- 9 Edw. VII. ch. 73, sec. 9 (O.) (Amending Municipal Act).  
*See MUNICIPAL CORPORATIONS, 5.*
- 9 Edw. VII. ch. 73, sec. 10 (O.) (Amending Municipal Act).  
*See MUNICIPAL CORPORATIONS, 9.*
- 9 Edw. VII. ch. 82, secs. 32, 209 (O.) (Amending Liquor License Act).  
*See LIQUOR LICENSE ACT, 3.*

## STATUTES (INTERPRETATION).

*See BANKS AND BANKING, 1—*

CONSTITUTIONAL LAW—DEVOLUTION OF ESTATES ACT—PUBLIC SCHOOLS.

### STAY OF ACTIONS.

See CONSTITUTIONAL LAW.

### STAY OF PROCEEDINGS.

See PLEADING, 2.

### STREET RAILWAYS.

1. *Injury to Passenger—Negligence—Cause of Injury—Sudden Jerk in Starting Car—Withdrawal from Jury by Charge—Misdirection—Premature Starting of Car—Finding of Jury—New Trial—Objection not Taken at Trial—Real Question not Passed upon.*—The plaintiff, immediately after entering a car of the defendants, and before she had reached a seat, was, from some cause, thrown down backwards and injured. In an action against the defendants for damages, the negligence charged in the statement of claim as the cause of the fall was "the sudden jerking forward of the car," and this was supported by the evidence of the plaintiff herself and of two other eye-witnesses of the occurrence. Evidence was called for the defence to shew that the car was new and in good condition, that only the lowest notch was used in putting on the power, and that there was no unusual jerk. The trial Judge in his charge practically withdrew from the jury the consideration of the alleged jerk as the cause of the fall, but told the jury to consider whether the conductor was negligent in starting the car before the plaintiff (an aged person) was seated. The jury found that the defendants' servants were negligent in starting the car before the plaintiff was in a position

to save herself from falling; and the trial Judge directed judgment to be entered for the plaintiff. There was some mention in the evidence of the premature starting of the car, but it was not put forward as an independent cause of complaint until the Judge emphasised it in his charge. Neither party made any objection to the charge. The defendants appealed from the judgment, but the plaintiff did not, by cross-appeal or otherwise, raise an objection to the practical withdrawal from the jury of the chief cause of complaint:—

*Held*, that the question of the jerk should not have been withdrawn from the jury; there was but one incident, made up of the conduct of the conductor in giving the signal and that of the motor-man in obeying it; and it should have been left as one question to the jury. The finding actually made could not, upon the evidence, be supported.

*Held*, also, that the circumstance that an objection was not taken at the proper time was not necessarily fatal.

*Brenner v. Toronto R.W. Co.* (1907), 15 O.L.R. 195, 198, and *Woolsey v. Canadian Northern R.W. Co.* (1908), 11 O.W.R. 1030, 1036, followed.

*Held*, also, that it was to be inferred that the jury (influenced by the Judge's remarks) did not consider the evidence upon the question of the jerk, and that their finding did not imply that that question was determined in favour of the defendants.

*Held*, also, that the real question in issue not having been passed upon by the jury, there was power to direct a new trial; MEREDITH, J.A., dissenting.

*Jones v. Spencer* (1897), 77 L.T.R. 536, followed.

*Per* MEREDITH, J.A., that the defendants' appeal should be allowed and the action dismissed; the case was the rare one of an accident for which no one could be justly blamed; and the Court had, in the circumstances, no power to direct a new trial. *Burman v. Ottawa Electric R.W. Co.*, 446.

2. *Injury to Passenger Alighting from Car—Unauthorised Signal to Start—Negligence—Undisputed Facts—Inference—Questions for Jury—Defective System—Pleading—Amendment—New Trial.*]

—The plaintiff was a passenger upon a crowded open car of the defendants, who operated an electric railway upon the streets of a city. The plaintiff wished to alight at N. street, and the car stopped there, upon the signal of the conductor, who was upon the foot-board, engaged in collecting fares. While the plaintiff was in the act of alighting, the car was started, upon a signal given by an unauthorised person who was standing on the rear platform, and the plaintiff was thrown down and injured. The car had previously, on the same trip, been started, after a stop, by the same unauthorised person, and the conductor had not interfered or reprimanded him. The plaintiff alleged negligence in starting the car too soon and in overcrowding the car so that the conductor was not able to perform his duties, and claimed damages for her injuries. The facts were not in dispute, and the trial Judge withdrew the case from the jury, and gave judgment for the defendants:—

*Held*, that it did not follow that,

because there were no facts in dispute, the matter to be decided was a pure question of law; it might be for the jury to say what they found to be the true inference from these facts, *e.g.*, whether there was negligence causing the accident; there was at least one question which should have been submitted to the jury, *viz.*, whether there was any negligence of the conductor in failing to hear or to countermand the unauthorised signal for starting the car, in time to have prevented injury to the plaintiff, particularly in view of what had previously taken place.

And *semble*, that there was at least one other question which might be submitted to the jury, *viz.*, whether the defendants failed in their duty in not taking due precautions to prevent the starting of the car through the unauthorised act of a passenger in ringing the bell, which might involve the question (not raised by the pleadings) whether the system adopted by the defendants was defective.

*Nichols v. Lynn and Boston R.R. Co.* (1897), 168 Mass. 528, approved and followed.

*Held*, therefore, that there should be a new trial, with leave to the plaintiff to amend as she might be advised; RIDDELL, J., dissenting.

*Per* RIDDELL, J., that the plaintiff had failed to establish a case of negligence as charged; and, if she wished to allege a defective system, could only be allowed to do so in a fresh action, or in this action upon amendment, payment of costs, and being confined to the new cause of action.

Judgment of the County Court of the County of York reversed. *Haigh v. Toronto R.W. Co.*, 601.



3. *Injury to Person Crossing Track — Negligence — Contributory Negligence — Evidence for Jury—New Trial.*—In an action for damages for injuries sustained by the plaintiff, owing, as he alleged, to the negligence of the defendants, whereby he was struck by a car operated by their servants, while crossing a highway on foot:—

*Held*, that there was, at the close of the plaintiff's case, some evidence proper to be passed upon by the jury both of negligence on the part of the defendants and of contributory negligence on the part of the plaintiff; and that a nonsuit was properly set aside and a new trial directed.

Judgment of a Divisional Court, 20 O.L.R. 71, affirmed.

*Per* GARROW, J.A., that it is the well-established rule that, where reasonable evidence is given of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff, these issues must be determined by the jury. The cases which at first sight seem to qualify this rule are cases in which the Court was able to reach the conclusion that the negligence of the plaintiff was the sole cause, or that the conduct of the plaintiff was *per se* negligent, or the evidence so clear and undisputed that only the one inference could be reasonably possible. *Jones v. Toronto and York Radial R.W. Co.*, 421.

*See* COMPANY, 2.

### SUMMARY TRIAL.

*See* CRIMINAL LAW, 3, 4.

### SUNDAY CLOSING.

*See* MUNICIPAL CORPORATIONS, 10.

### SURVIVORSHIP.

*See* GIFT—WILL, 2.

### TAXATION OF COSTS.

*See* INFANT.

### TAXES.

*See* LANDLORD AND TENANT, 1.

### TEACHER.

*See* PUBLIC SCHOOLS.

### THEFT.

*See* CRIMINAL LAW, 3, 4.

### TIME.

*See* CONTRACT, 2.

### TORT.

*See* NEGLIGENCE, 2—RAILWAY, 2, 3.

### TRIAL.

*Jury Notice — Action against Municipal Corporation — "Non-repair"*—*Ontario Judicature Act, sec. 104.*—In an action against a city corporation to recover damages for injuries sustained by the plaintiff, the allegation in the statement of claim was that "the plaintiff tripped by reason of a hole in the boulevard caused by the negligence of the defendants taking up the old sidewalk and not filling in:—"

*Held*, that, whether the negligence alleged was misfeasance or nonfeasance, the action was "in respect of injuries sustained through nonrepair of streets, roads or sidewalks," within the meaning of sec. 104 of the Ontario Judicature Act, and was, therefore, to be tried by a Judge without a jury.

Discussion of the authorities and the meaning of the word "nonrepair."

Order of *BOYD, C.*, reversed,



and that of the Master in Chambers, striking out the jury notice, restored. *Brown v. City of Toronto*, 230.

See CRIMINAL LAW, 3—LIQUOR LICENSE ACT, 4—STREET RAILWAYS, 1.

## VENDOR AND PURCHASER.

*Contract for Sale of Land—Option — Consideration — Sale of another Parcel—Separate Contracts in one Writing—Right to Withdraw Offer before Acceptance—Notice — Knowledge of Sale to Stranger—Description of Land—“Vacant Lot.”*] — The plaintiff signed a written memorandum in these words: “I agree to purchase from J.S. the brick house on the W. road with            feet to the south of the dwelling, making a roadway to the back yard, that is, a line to the back fence where there is a jog and from that to the W. road, the price being \$2,850.” On the same piece of paper there was a memorandum signed by the defendant: “I, J.S., agree to sell the above property for the above stated sum. I also promise to give the purchaser the option of purchasing the vacant lot to the south of this lot, for the sum of \$1,000, providing that this offer be accepted within one year from date. Dated at London, May 8th, 1908:”—

*Held*, on conflicting evidence, that the two writings were signed at the same time.

The agreement as regards the land first mentioned was implemented by a conveyance.

On the 12th November, 1908, the defendant conveyed a portion of the “vacant lot” to S., of which the plaintiff was made aware; but, nevertheless, the plaintiff gave the defendant formal notice, on

the 11th March, 1909, of his acceptance of the offer to sell the vacant lot:—

*Held*, that the offer or option was not an integral part of the agreement for the sale of the land referred to in the first part of the memorandum, so as to supply a consideration sufficient to support the “promise” made in the latter part; but was a mere offer, which could be withdrawn before acceptance, without any formal notice to the plaintiff, and it was sufficient that the plaintiff had actual knowledge that the defendant had done an act inconsistent with the continuance of the offer, *i.e.*, selling part of the vacant lot to S.

*Held*, also, *per* BRITTON, J., that the description of the vacant lot was sufficient.

Judgment of SUTHERLAND, J., decreeing specific performance of the agreement to sell the vacant lot, in so far as the same could still be performed by the defendant, reversed. *Davis v. Shaw*, 474.

See CONTRACT, 2.

## VICTUALLING HOUSES.

See MUNICIPAL CORPORATIONS, 10.

## VOLUNTARY PAYMENTS.

See INSURANCE, 2.

## VOTERS' LISTS.

See MUNICIPAL CORPORATIONS, 1-6, 9.

## VOTING.

See MUNICIPAL CORPORATIONS, 1-6, 9.

## WARRANT OF COMMITMENT.

See CRIMINAL LAW, 3—LIQUOR LICENSE ACT, 2, 3.

## WAY.

*Private Lane — Dedication — Acceptance by Municipality—Sidewalk Placed and Repaired by Owner of Adjoining Property—Tacit Permission of Municipality—Duty of Owner—Injury to Person Lawfully Using Sidewalk — Defect — Liability — Negligence — Contributory Negligence — Jury — Absence of Knowledge—Constructive Notice.]*—About forty years before action, G. laid out a lane in a city between building lots of his own on either side, leading eastward from a street, but blind at the east end. This lane had ever since been open. There was no formal dedication to the city, but the city had put a gas main, two gas lamps, a water main, and a hydrant upon the lane. The city had not assessed the lane; and it was apparently considered in all respects, save one, as a city street. But G. built a sidewalk upon the lane, after what he considered dedication, and also repaired it from time to time as required. In 1896 G. gave the property to his wife, the defendant, but continued to look after it for her. On the 22nd October, 1908, a person drove upon this sidewalk and broke it, but neither the defendant nor her husband knew this until after the plaintiff was injured on the 24th October. The plaintiff, thinking the lane was open at the east end, drove along it towards the east, and, having some trouble with his horse, jumped out upon the sidewalk at the point where it had been broken, and was injured. The part of the sidewalk which was broken had been put in by G. since the transfer to the defendant.

In an action for damages for the plaintiff's injuries the jury nega-

tived all negligence except the failure to repair from the 22nd to the 24th October, which they found to be negligence:—

*Held*, that G. intended to dedicate the lane, and the city accepted the dedication, long before the defendant became owner of the property adjoining; the lane was, therefore, a public highway, the plaintiff was properly there, and there was nothing in his act in leaping upon the sidewalk in itself wrong; and the rights of the parties depended upon the duty of the defendant in respect of the sidewalk.

Although the defendant did not prove any express permission or license from the city to place or repair the sidewalk, sufficient appeared to shew that the city tacitly licensed and permitted what was done; the private liability to repair was co-extensive with that of the city, and not more onerous; there must be ordinary care and diligence—an absence of negligence; and the finding of the jury of negligence in not repairing within two days, a time which would not justify a Court in inferring notice, could not be allowed to stand.

Judgment of LATCHFORD, J., dismissing the action, affirmed. *Rushton v. Galley*, 135.

See EASEMENT — HIGHWAY — TRIAL.

## WILL.

1. *Construction—Devise of Dwelling—Lands Enjoyed with—Addition of Buildings after Date of Will—Avoidance of Intestacy—Con. Rule 938—Scope of—Admission of Evidence to Shew Circumstances.]*—The testator devised to his adopted daughter (subject to the life estate of his wife) "the dwelling

on the south side of B. street in which we now reside, in the town of P., in the county of B." At the date of the will the testator and his wife lived in his house in B. street, which stood upon a lot having a barn at the rear. Before his death he added two rooms to the original house, and moved the barn to the front, and improved it into another habitable house. He was still, at his death, living in the original dwelling. There was nothing in the will to indicate an intention that the whole lot and whatever was thereon should not go with the dwelling. It was contended that there was an intestacy as to the parts of the lot occupied by the addition of the two rooms and the site of the removed barn:—

*Held*, that the devisee took the whole premises.

*In re Alexander*, [1910] W.N. 36, *In re Champion*, [1893] 1 Ch. 101, and *Governors of St. Thomas's Hospital v. Charing Cross R.W. Co.* (1861), 1 J. & H. 400, 404, followed.

*Held*, also, that the Court had jurisdiction, upon an originating notice under Con. Rule 938, to construe the will and to take such evidence as might assist to understand the situation at the date of the will and the date of the death. *Re Stokes*, 464.

2. *Construction—Devise to Two—Joint Enjoyment so Long as One "Remains Unmarried"—Death—Survivorship—Bequest of "Contents" of House—Personal Jewellery.*—The testatrix devised and bequeathed "my residence and property . . . and all the contents thereof, with my horses, carriages, harnesses, and stable furniture, to my executors in trust to allow my husband G. P. and

Theresa M. B. K. to jointly enjoy the same as long as G. P. remains unmarried, but if he marry then to T. M. B. K. for life, and if said T. M. B. K. marry and leave a child or children her surviving, then I give devise and bequeath said property to such child or children, but if said T. M. B. K. die without a child or children her surviving, then said property is to fall into the residue of my estate. . . ." T. M. B. K. married in 1908 and had issue; G. P. died in January, 1910:—

*Held*, that, while a surviving husband ceases to be in a state of widowhood when he dies, he still "remains unmarried;" and the effect of the will was to continue the enjoyment by T. M. B. K. after the death of G. P.; and, as the enjoyment was to be joint, she had the right of survivorship, and thus the sole right for her life to the enjoyment of the residence and property and contents.

*Rishton v. Cobb* (1839), 5 My. & Cr. 145, explained and followed.

*Held*, also, that the personal jewellery of the testatrix, found in the residence at her death, was covered by the words "all the contents thereof," although practically the idea of joint enjoyment of it or enjoyment at all by G. P. was excluded—the fact that the enjoyment could not be by both at the same time, and probably by one not at all, could not change the meaning of the words. *Re Perrie*, 100.

3. *Construction—Gift to "Children"—Previous Mention by Name of Illegitimate Children—Exclusion of Legitimate Children—Inference from Language of Will and Surrounding Circumstances.*] — The testator, dying in 1883, left a wife



and children in England, whom he had deserted in 1853. At the time of his death he was living in Ontario with H., a woman whom he called his wife, and by whom he had several illegitimate children, who also lived with him. So far as appeared, there had been no communication between him and his wife and legitimate children since he deserted them. By his will he made specific devises and bequests to H. and his illegitimate children, referring to them by name and as "my wife," "my son," "my daughter." He then directed that the residue should be divided among his "children:"—

*Held*, that *prima facie* "children" imports legitimate children only, but that interpretation yields where a contrary intention, which the law is entitled to regard, appears; and in this case, having regard to the surrounding circumstances and the wording of the will, there was so strong a probability of the testator's intention to include only the children of H. in the word "children" wherever used in the will, that a contrary intention could not be supposed; and it was therefore declared that they alone were entitled to share in the residue.

Review of the authorities. *Lobb v. Lobb*, 262.

4. *Probate—Testamentary Writings of Different Dates Standing together.*—The testatrix, who died in 1908, left two testamentary writings, both properly executed as wills, one dated in 1875 and the other in 1879. The two documents were found, after her death, folded together. The two were in the same words down to and including the fourth paragraph of each. The fifth paragraph of each was the same, ex-

cept that in the later document additional provision was made for paying off a mortgage on a certain cottage. The sixth paragraph of the earlier document provided for the division of the surplus of the estate (except the articles therein specifically bequeathed) among three nieces of the testatrix. This paragraph was entirely omitted from the later document; and the later one did not contain any direction as to or disposition of the residue of the estate, nor any revocatory clause. The sixth and seventh paragraphs of the later document disposed of the cottage spoken of; and the subsequent paragraphs disposed of various articles of personal property, some to the same persons to whom they were given by the earlier document, while in some cases the destination was changed. No pecuniary legacy was given by the second document. The same executors were appointed in both. The later one was called "my last will." If the later one alone were admitted to probate, there would be an intestacy as to part of the estate, as there was a considerable residue, and no residuary gift:—

*Held*, that the two documents together constituted the last will of the testatrix, and letters of administration with both documents annexed were properly granted.

*In the Estate of Bryan*, [1907] P. 125, 76 L.J.N.S.P. 30, distinguished.

Judgment of the Surrogate Court of Northumberland and Durham affirmed. *Re Molson, Ward v. Stevenson*, 289.

## WINDING-UP.

See BANKS AND BANKING, 1—COMPANY, 1.



## WORDS.

- "Action." — See LIQUOR LICENSE ACT, 3.  
 "Active Negligence." — See RAILWAY, 2.  
 "Brother-in-law." — See LIQUOR LICENSE ACT, 1.  
 "Children." — See WILL, 3.  
 "Company." — See PROMISSORY NOTES.  
 "Contents of House." — See WILL, 2.  
 "Intrusted or Delivered for Transportation." — See RAILWAY, 2.  
 "Limited." — See PROMISSORY NOTES.  
 "Named." — See MUNICIPAL CORPORATIONS, 5.  
 "Nonrepair." — See TRIAL.  
 "Oil Leases." — See EXECUTION.  
 "Remains Unmarried." — See WILL, 2.  
 "Unlawfully." — See LIQUOR LICENSE ACT, 3.  
 "Vacant Lot." — See VENDOR AND PURCHASER.















